APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 03-1098, 03-1238

THE TIMKEN COMPANY,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellee,

v.

KOYO SEIKO CO., LTD. and
KOYO CORPORATION OF U.S.A.,
Defendants-Appellants,

and

NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN CORPORATION, NSK LTD., and NSK CORPORATION,

Defendants.

DECIDED: Jan. 16, 2004
Rehearing Denied March 17, 2004

Before NEWMAN, BRYSON, and PROST, Circuit Judges.

PROST, Circuit Judge.

Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively, "Koyo") appeal the decision of the United States Court of International Trade in *Timken Co. v. United*

States, 240 F.Supp.2d 1228 (CIT 2002), holding that the United States Department of Commerce ("Commerce") properly "zeroed" any negative dumping margins in calculating the weighted-average dumping margin applied to imports of Koyo's tapered roller bearings ("TRBs") from Japan. The Timken Company ("Timken") cross appeals arguing that Commerce, in calculating Koyo's constructed export price ("CEP"), improperly applied the adverse-facts-available rate to the entered value rather than the sales value of Koyo's TRBs. Because we agree with the Court of International Trade that Commerce properly resolved both issues, we affirm.

I

Commerce issues antidumping duty orders for imported merchandise that is sold in the United States below its fair value and materially injures or threatens to injure a domestic industry. *See* 19 U.S.C. § 1673e (2000); 19 U.S.C. § 1673d. Specifically, Commerce determines the antidumping duties by first calculating the "dumping margin," which is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A); *see also Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed.Cir.2001). Commerce uses a CEP if, "before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter." *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103-826, at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("*SAA*").[1] Various adjustments may be

[1] The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

made to CEP, including reduction by "the cost of any further manufacture or assembly" in the United States. *See* 19 U.S.C. § 1677a(d)(2).

After calculating the dumping margins on the individual U.S. transactions subject to review, Commerce calculates the weighted-average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer." *Id.* § 1677(35)(B); *see also Koyo Seiko*, 258 F.3d at 1342-43. When calculating the weighted-average dumping margin, Commerce treats transactions that generate "negative" dumping margins (i.e., a dumping margin with a value less than zero) as if they were zero. *See, e.g., Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 675 F.Supp. 1354, 1360-61 (Ct. Int'l Trade 1987). This practice is referred to as "zeroing." Finally, Commerce uses this weighted-average dumping margin to calculate the duties owed on an entry-by-entry basis. 19 U.S.C. § 1675(a)(2).

In this case Commerce initiated an administrative review of alleged sales of TRBs from Japan at less than fair value during the period of October 1, 1998, through September 30, 1999. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 64 Fed. Reg. 67,846 (Dec. 3, 1999). Based on its review, Commerce calculated preliminary dumping margins of 17.94% on TRBs greater than four inches in diameter and 14.86% on TRBs less than four inches in diameter. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 66,711 (Nov. 7, 2000) ("*Preliminary Results*"). Koyo exported both types of merchandise and thus became potentially liable for antidumping duties. *Id.* Both Koyo and Timken subsequently filed case and rebuttal briefs, with Koyo ques-

tioning, *inter alia*, Commerce's zeroing practice, and Timken questioning, *inter alia*, Commerce's application of the adverse-facts-available rate to the entered value rather than sales value of Koyo's TRBs.

Commerce provided a response in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 66 Fed. Reg. 15,078 (Dep't Commerce Mar. 15, 2001) ("*Final Results*") and the accompanying *Issues and Decision Memorandum*, P.R. Doc. No. 141 (Mar. 7, 2001) ("*Decision Mem.*"). With respect to Koyo's challenge, Commerce noted that it properly calculated the weighted-average dumping margin by "zeroing" all negative-dumping-margin transactions. Commerce explained that its calculation methodology was derived from the explicit statutory language, and consistent with international obligations. *See Decision Mem.*, cmt. 1, at 8. Consequently, it finalized Koyo's company-specific, weighted-average dumping margins. *Final Results*, 66 Fed. Reg. at 15,079. With respect to Timken's challenge to the application of the adverse inference to the entered value, Commerce found that Timken's suggested approach would be unduly punitive. *Decision Mem.* at 8. Thus, Commerce continued to apply the adverse inference to the entered value rather than the sales value of Koyo's TRBs.[2] *Id.*

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[2] Based on existing information, Commerce, at an earlier stage in this proceeding, determined that the value added to Koyo's TRBs substantially exceeded the value of the subject merchandise. It also concluded that the methods for calculating CEP provided in § 1677a(e) would result in an unreliable surrogate value. *Decision Mem.* at 5-6. Accordingly, Commerce exercised its discretion to employ "any other reasonable basis" to calculate the margins for further-manufactured merchandise. *Id.* at 6. It chose to apply its standard methodology, as outlined in § 1677a(d)(2), and required Koyo to file a Section E questionnaire response detailing sales and cost information for its further-manufactured TRBs. *Id.* at 6-7. Koyo refused to comply, however, because it believed it qualified for appli-

The Court of International Trade's review of Commerce's *Final Results* dealt with, *inter alia:* (1) Koyo's arguments that Commerce improperly "zeroed" negative dumping margins when calculating Koyo's weighted-average dumping margins, and (2) Timken's arguments that Commerce should have applied the adverse-facts-available rate to the sales value of Koyo's TRBs. *See Timken*, 240 F.Supp.2d at 1228. As to the first issue, Koyo primarily argued that Commerce's statutory interpretation was unreasonable in light of the World Trade Organization ("WTO") Appellate Body's interpretation of the Antidumping Duty Agreement ("ADA") in *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/AB/R (Mar. 1, 2001) ("*EC—Bed Linen*"). *Timken*, 240 F.Supp.2d at 1242. Rejecting the government's threshold argument that § 3512(c) barred Koyo's appeal, the Court of International Trade went on to note that it had previously affirmed zeroing as a reasonable interpretation of 19 U.S.C. § 1673. *Id.* at 1243 (citing *Serampore Indus.*, 675 F.Supp. at 1360-61 (Ct. Int'l Trade 1987); *Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. United States*, 926 F.Supp. 1138, 1150 (Ct. Int'l Trade 1996)). It also distinguished the *EC—Bed Linen* report because it (1) did not address the U.S. practice of zeroing, and (2) dealt with an antidumping investigation rather than an administrative review. *Id.* Given that the statute requires Commerce to calculate dumping duties on an entry-by-entry approach and that previous cases determined that zeroing is a reasonable practice under the statute, the Court of International Trade found Commerce's zeroing practice reasonable. *Id.*

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cation of the approach in 19 U.S.C. § 1677a(e). *Id.* at 2-4. Consequently, Commerce applied an adverse inference, as authorized by 19 U.S.C. § 1677e(b), and applied the adverse-facts-available rate to the total *entered* value of Koyo's TRBs. *Id.* at 8.

Addressing Timken's arguments that Commerce should have applied the adverse-facts-available rate to the sales value of Koyo's TRBs, the Court of International Trade affirmed Commerce's approach. First, the court found it was consistent with the regulations, see 19 C.F.R. § 351.212(b)(1), and prior court holdings. *Timken*, 240 F.Supp.2d at 1233 (citing *NTN Bearing Corp. of Am. v. United States,* 186 F.Supp.2d 1257, 1315 (Ct. Int'l Trade 2002)). Second, according to the court, Commerce properly adhered to the overriding goal of accurately determining dumping margins, rather than creating an overly punitive result. *Id.* at 1234. Because the value of Koyo's TRBs increased substantially as a result of post-importation manufacturing, and because subjecting this increase to duties would have been contrary to the purpose of the anti-dumping statute, the court found that Commerce reasonably used the entered value. *Id.* at 1234-35. The Court of International Trade therefore upheld Commerce's application of the adverse-facts-available rate to Koyo's entered value; Commerce's decision was supported by substantial evidence and not contrary to law. *Id.*

Koyo filed a timely appeal; Timken filed a timely cross appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II

In reviewing the Court of International Trade's review of a final determination issued by Commerce, we apply "anew" the statutorily-mandated standard of review. Accordingly, we will "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed.Cir.1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

A

On appeal, Koyo argues that Commerce acted unreasonably in zeroing negative-margin transactions. It contends this practice violates 19 U.S.C. § 1677b(a), which calls for a "fair comparison" of export price ("EP") or CEP and normal value. Koyo relies on the WTO Appellate Body's decision in *EC—Bed Linen*, holding that the practice of zeroing when calculating dumping margins is *not* a "fair comparison" between EP or CEP and normal value. Thus, because § 1677b(a) specifically implements the "fair comparison" requirements of Article 2.4 of the ADA, and because Commerce refused to interpret the statute in a manner consistent with U.S. international obligations by ignoring the holding in *EC—Bed Linen*, Koyo asks that we find that Commerce acted unreasonably in zeroing negative-margin transactions.

Timken and the United States respond that the plain meaning of the antidumping statute calls for Commerce to zero negative-margin transactions, and that the legislative history confirms this reading. Alternatively, even assuming that the statute contains an ambiguous instruction, Timken and the United States argue that Commerce reasonably interpreted the statute and deserves deference. Addressing Koyo's arguments relying on *EC—Bed Linen*, Timken and the United States reiterate the distinctions between that case and this case articulated by the Court of International Trade. Finally, Timken and the United States argue that 19 U.S.C. § 3512(c) and the SAA bar Koyo from bringing this challenge, and that § 3533 precludes us from addressing the implementation of adverse WTO decisions.

We begin by addressing the government's argument that § 3512(c) bars Koyo from bringing this action. Section 3512(c) bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the Uruguay Round Agreements Act ("URAA"). 19 U.S.C. § 3512(c). As the Court of International Trade

noted, however, Koyo brought this action under U.S. law under the assumption that it would be interpreted so as to avoid a conflict with international obligations. *Timken*, 240 F.Supp.2d at 1242. We agree and find that § 3512(c) does not prevent us from addressing Koyo's appeal.

On the merits of Koyo's appeal, we apply a familiar two-part inquiry to determine whether to sustain an agency's interpretation of the statutory scheme it is charged with administering. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, we determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* "[I]f the statute is silent or ambiguous with respect to the specific issue," however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. In this case, therefore, we must determine whether the statute unambiguously requires providing for zeroing negative margin transactions and, if not, whether Commerce reasonably interpreted the statute to so require.

Turning to the words of the statute, 19 U.S.C. § 1677(35)(A) defines "dumping margin" as "the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A) (emphasis added). Timken and the United States both argue that the use of the word "exceeds" limits the definition of "dumping margin" to positive numbers. In support of their argument, they appropriately cite dictionaries. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1381 (Fed.Cir.2001) ("In order to ascertain the established meaning of a [commonly used] term . . . it is appropriate to consult dictionaries."). These

dictionaries define "exceeds" as "to be or go beyond (the given or supposed limit, measure, or quantity)," *Webster's New Twentieth Century Dictionary of the English Language Unabridged* 636 (2d ed.1980), or "1. To be greater than; surpass. 2. To go beyond the limits of," *The American Heritage College Dictionary* 477 (3d 1993).

Recognizing this as a close question, we are reluctant to find these dictionary definitions so clear as to compel a finding that Congress expressly intended to require zeroing. Even using the above "greater than" definitions, the statute does not plainly require consideration of only those dumping margins with a positive value. At least in a mathematical context, "exceeds" does not unambiguously preclude the calculation of a negative dumping margin. We thus disagree with the government's position that Congress deliberately used the word "exceeds" to avoid the calculation of negative dumping margins, instead of using the more open-ended phrase "difference between." Rather, the word "exceeds" could arguably allow for negative dumping margins because it guides the manner in which to set up the mathematical equation—x "exceeds" y = x-y. Similarly, the words "difference between" could arguably be construed as calling for the absolute value of the difference, a positive number—the "difference between" x and y = |x-y|. Finally, reviewing the legislative history as a whole, we disagree with Timken's argument that the relevant statements, or lack thereof, conclusively demonstrate Congress's adoption of definitions specifically requiring zeroing. Accordingly, we conclude that Congress's use of the word "exceeds" does not unambiguously require that dumping margins be positive numbers.

Because we find that the statute does not directly speak to the issue of negative-value dumping margins, we evaluate whether Commerce's interpretation is based on a permissible statutory construction. Under this second step of the *Chevron* analysis, "[a]ny reasonable construction of the statute is a

permissible construction." *Torrington v. United States*, 82 F.3d 1039, 1044 (Fed.Cir.1996). "To survive judicial scrutiny, [Commerce's] construction need not be the only reasonable interpretation or even the most reasonable interpretation. . . . Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed.Cir.1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978)). Indeed, we have accorded particular deference to Commerce in antidumping determinations. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed.Cir.1983) ("The Secretary has broad discretion in executing the [anti-dumping] law.").

We conclude Commerce based its zeroing practice on a reasonable interpretation of the statute. First, while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction. Basically, one number "exceeds" another if it is "greater than" the other, meaning it falls to the right of it on the number line. Here, because Commerce's zeroing practice is a reasonable interpretation of the statutory language, we do not question it in light of other reasonable possibilities.

Second, Commerce's methodology for calculating dumping margins makes practical sense. Commerce calculates dumping duties on an entry-by-entry basis. 19 U.S.C. § 1675 (a)(2). Its practice of zeroing negative dumping margins comports with this approach. Borrowing Timken's example, suppose a foreign exporter sells the same product to two U.S. customers. The product has a normal value of $0.90, and is sold to the first customer for $1.00 and the second customer for $0.70. Calculated in accordance with § 1677(35)(A), the dumping margin for the first customer is zeroed (0.90-1.00 = -0.10 —> 0) and for the second customer

is 0.20 (0.90-0.70 = 0.20). Assuming sales of 1000 units to each customer, the first customer would not have to pay any dumping duties because it paid a price above normal value, and the second customer would have to pay $200 (1000 transactions x 0.20 dumping margin/transaction = 200) because it paid a price below normal value. This approach makes sense; it neutralizes dumped sales and has no effect on fair-value sales. On the other hand, the approach urged by Koyo, whereby Commerce could not zero negative transactions, would essentially require Commerce to grant the first customer a credit. In the absence of offsetting sales below fair market value, however, Commerce could potentially owe the first customer a payment—a result clearly not contemplated by the statutory scheme.

Third, we note that the Court of International Trade has specifically addressed Commerce's zeroing practice and found it reasonable and in accordance with the law. *See Serampore*, 675 F.Supp. at 1360-61; *Bowe Passat*, 926 F.Supp. at 1150. We find these decisions instructive for purposes of our analysis. Notably, both of these pre-URAA cases found zeroing to be a reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to "mask" sales at less than fair value. *Serampore*, 675 F.Supp. at 1360-61; *Bowe Passat*, 926 F.Supp. at 1150. Although Koyo argues that these decisions addressed the law as it existed prior to the adoption of the URAA's "fair comparison" requirements, we find this argument unpersuasive. Neither the pre-URAA nor the current definitions unambiguously address the practice of zeroing. The URAA-incorporated "fair comparison" requirement, which simply applies to the calculation of normal value under § 1677b(a), does not change this result. The § 1677(35) definitions do, however, lend support to Commerce's statutory construction (as discussed above), even when considered in light of this new "fair comparison" requirement.

According Commerce its proper deference, we hold that it reasonably interpreted § 1677(35)(A) to allow for zeroing.

We turn now to Koyo's argument that Commerce unreasonably interpreted § 1677(35) to allow for zeroing, beginning with a review of the WTO's *EC—Bed Linen* report upon which Koyo so heavily relies. *EC—Bed Linen* dealt with a trade dispute between the European Community ("EC") and India. *EC—Bed Linen,* WT/DS141/AB/R ¶ 1. The EC, in investigating and levying duties on the importation of bed sheets from India, engaged in the practice of zeroing negative-margin transactions. *See id.* ¶ 8. India brought an action at the WTO, claiming that the EC practice of zeroing violated Article 2.4.2 of the ADA. *See id.* ¶ 1. The WTO Appellate Body evaluated the EC's practice in light of both this article and Article 2.4, which states that one must make a "fair comparison" between the EP or CEP and the normal value when calculating dumping margins. *Id.* ¶¶ 46-66. It took the "fair comparison" language to mean that *all* transactions must be accounted for, whether creating positive or negative dumping margins. *Id.* ¶ 55. Thus, because it was unfair to exclude negative-margin transactions, the WTO Appellate Body concluded that the EC practice of zeroing during an antidumping investigation was impermissible under the ADA. *Id.* ¶ 66.

In light of the decision in *EC—Bed Linen,* Koyo asks us to interpret the "fair comparison" language in the U.S. antidumping statute in a manner consistent with U.S. international obligations, thereby adopting the holding in *EC—Bed Linen* and finding Commerce's zeroing practice an unreasonable statutory interpretation. The crux of its argument hinges on the *Charming Betsy* canon of claim construction, according to which courts should interpret U.S. law, whenever possible, in a manner consistent with U.S. international obligations. *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); *see also Fed.-Mogul*

Corp. v. United States, 63 F.3d 1572, 1581 (Fed.Cir.1995) (noting that trade laws are not exempt from the *Charming Betsy* principle); *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed.Cir.2002) ("[T]he statute must be interpreted to be consistent with [international] obligations, absent contrary indications in the statutory language or its legislative history."). Koyo secondarily relies on its claim that the EC and United States have functionally identical practices that demand similar treatment. Because Commerce has the authority to bring its practice into conformity with U.S. international obligations, Koyo contends, we should find that it was unreasonable for Commerce to continue interpreting the antidumping statute in a non-conforming manner by allowing zeroing.

Koyo's reliance on the "fair comparison" language is misplaced. Section 1677b(a) requires a "fair comparison" as follows: "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). Thus, "in order to achieve a fair comparison with the export price or constructed export price," *id.*, the statute particularly sets out how to calculate "normal value." *See id.* § 1677b(a)(1)-(8). We agree with the government's position that this is an exhaustive list, and that the "fair comparison" requirement upon which Koyo now relies is specifically defined in the normal-value-calculation instructions. As such, the "fair comparison" requirement of § 1677b(a) does not impose any requirements for calculating normal value beyond those explicitly established in the statute and does not carry over to create additional limitations on the calculation of dumping margins. The SAA supports our conclusion. *SAA, supra*, at 820 ("To achieve such a [fair] comparison, section 773 [§ 1677b] provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability."). This court has also previously recognized that the explicit statutory adjustments help make a "fair, 'apples-to-apples'

comparison" between normal value and EP or CEP. *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir.2001) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed.Cir.1995)).

Further, even assuming that the "fair comparison" language in § 1677b(a) did not limit the analysis to calculating normal value using the statutorily-prescribed adjustments, we would nonetheless find Commerce's continued practice of zeroing reasonable in light of *EC—Bed Linen.* As Koyo acknowledges, the decision is not binding on the United States, much less this court. While Koyo relies on *EC—Bed Linen* for its persuasive value in an effort to convince us of the unreasonableness of Commerce's zeroing practice, we do not find it sufficiently persuasive to find Commerce's practice unreasonable. In light of the fact that Commerce's "long-standing and consistent administrative interpretation is entitled to considerable weight," *Zenith,* 437 U.S. at 450, 98 S.Ct. 2441, we refuse to overturn the zeroing practice based on *EC—Bed Linen.*

Finally, we disagree with Koyo's assertion that the Court of International Trade erroneously distinguished *EC—Bed Linen.* As discussed above, the court distinguished *EC—Bed Linen* for two reasons: (1) it did not involve the United States, and (2) it dealt with an antidumping investigation as opposed to an administrative review of dumping. We agree with the Court of International Trade and find the absence of the United States as a party to be an important distinction.

As to the difference between an investigation and an administrative review, Koyo contends that the distinction is irrelevant—Article 2.4.2 and Article 9.3.1, dealing with investigations and administrative reviews respectively, should be read together. In addition, Koyo argues, the "fair comparison" requirements of § 1677b(a) do not differ depending on the nature of the action. We disagree and find

that the Court of International Trade properly distinguished the current case over *EC—Bed Linen*.

Because we find Commerce's zeroing practice to be a reasonable interpretation of the statute, even in light of the decision in *EC—Bed Linen*, we do not address the government's or Timken's arguments that this court is statutorily precluded from reconciling the two under 19 U.S.C § 3533.

B

On cross appeal, Timken contends that Commerce should have applied the adverse-facts-available rate to the sales value of Koyo's TRBs rather than the entered value. According to Timken, Commerce failed to effectuate the statutory purpose—to provide an incentive to comply—by applying an insufficiently adverse inference. Thus, Timken argues, relying on *Kawasaki Steel Corp. v. United States*, 110 F.Supp.2d 1029, 1041 (Ct. Int'l Trade 2000), that Koyo improperly gained a more favorable result by refusing to supply the Section E response.

In response, Koyo and the United States argue that Commerce reasonably applied the adverse-facts-available rate to the entered value of Koyo's TRBs. According to Koyo, using the entered value was reasonable because of the significant amount of value added in the United States—on average approximately 25% of the sales value consisted of the entered value—for which Koyo should not have to pay dumping duties. By choosing the entered value as the more reasonable surrogate, Koyo claims, Commerce properly balanced the statutory objectives of finding an accurate dumping margin and inducing compliance.

Again we begin with the relevant law. Commerce has stated that it "normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the *entered value* of such

merchandise for normal customs duty purposes." 19 C.F.R. § 351.212(b)(1) (emphasis added). In addition, the statute gives Commerce the discretion to apply an adverse inference if, as here, a party fails to comply with requests for information. 19 U.S.C. § 1677e(b); *see also SAA, supra*, at 870 ("Where a party has not cooperated, Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."). In keeping with these directives, the Court of International Trade has previously held that CEP can be calculated by applying adverse facts available to a party's entered value when there is further manufacturing. *See NTN Bearing Corp. of Am. v. United States*, 186 F.Supp.2d 1257, 1315 (2002). Finally, in selecting a reasonably adverse facts-available rate, Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance, rather than creating an overly punitive result. *See F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir.2000) ("*De Cecco*").

We conclude that Commerce's decision to use the entered rather than sales value was supported by substantial evidence and supported by law. First, we note that Commerce's methodology was consistent with the regulation, 19 C.F.R. § 351.212(b)(1), as well as the Court of International Trade's decision in *NTN Bearing*. Moreover, under the law, Commerce had no reason to alter its methodology to induce Koyo's compliance.

Second, Commerce has discretion to apply adverse inferences. As both Commerce and the Court of International Trade noted, Commerce is not statutorily required to select a method that is the "most" or "more" reasonably adverse. *Decision Mem.* at 8; *Timken*, 240 F.Supp.2d at 1234. Here, Commerce applied the highest adverse-facts-available rate ever applied in an investigation of Koyo's dumping—

41.04%. By using this high rate, Commerce reasonably attempted to induce Koyo's compliance with the Section E request. But in applying this rate to the entered value rather than the sales value, Commerce appropriately balanced the goal of accuracy against the threat of an unduly punitive result. *See Decision Mem.* at 8. Contrary to Timken's arguments, this demonstrates Commerce's adherence to the principles in *Kawasaki*. Given the significant amount of post-importation manufacturing that took place—the entered value represented on average 25% of the sales value—we find that Commerce's decision to use the entry value was in keeping with the statutory goals highlighted in *De Cecco*. Moreover, as the Court of International Trade noted, this value increase should not be subject to duties because it occurs after importation. To do so would be contrary to the inherent purpose of the antidumping statute—to prevent below-fair-market-value *imports*.

Timken challenges Commerce's conclusion that Timken's approach would be unduly punitive. In particular, Timken argues that Commerce erroneously found the substantial increase in value attributed to post-importation manufacturing necessarily implies that applying the adverse-facts-available rate to the sales value creates a punitive result. According to Timken, the information regarding entered and sales values did not in fact provide Commerce with sufficient information about production costs or dumping margins to support that conclusion.

We disagree, and defer to Commerce's analysis in light of its extensive experience with and knowledge of Koyo's further-manufactured sales and the value added in the United States following importation. *See Decision Mem.* at 6. Despite Koyo's failure to comply with the Section E request, Commerce had other information from Koyo demonstrating that the value added in the United States substantially exceeded the entry value. As the Court of International Trade

also noted, Commerce is "in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032. We similarly find that Commerce's expertise with and knowledge of Koyo's further manufacturing allowed it to select adverse facts to effectuate the statutory goals.

Based on the above, we find that Commerce reasonably applied the adverse-facts-available rate to the entered value. We therefore uphold the Court of International Trade's finding that "Commerce's application of adverse facts available to Koyo's entered value as supported by substantial evidence and in accordance with law." *Timken*, 240 F.Supp.2d at 1235.

CONCLUSION

For the foregoing reasons, we affirm the Court of International Trade's conclusion that Commerce's final results are supported by substantial evidence and otherwise in accordance with law.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE.

SLIP OP. 02-106.
Court No. 01-00127.

THE TIMKEN COMPANY,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

KOYO SEIKO, CO., LTD. and KOYO CORPORATION OF U.S.A.; NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION and NTN CORPORATION; NSK LTD., and NSK CORP.

Defendant-Intervenors.

Sept. 5, 2002.

OPINION

POGUE, Judge.

This consolidated action is before the Court on cross-motions for judgment on the agency record, pursuant to USCIT Rule 56.2. The parties challenge aspects of the Department of Commerce's ("Commerce" or "the Department") final results regarding sales at less than fair value ("LTFV") of Tapered Roller Bearings ("TRBs") from Japan covering the period of October 1, 1998 through September 30, 1999. *See Tapered Roller Bearings and Parts Thereof,*

Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan, 66 Fed.Reg. 15,078 (Dep't Commerce Mar. 15, 2001) ("*Final Results*") and the accompanying *Issues and Decision Memorandum*, P.R. Doc. No. 141 (Mar. 7, 2001) ("*Decision Mem.*"). The parties include several foreign and domestic producers of TRBs. The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B) and 28 U.S.C. § 1581(c).

Foreign TRB producers Koyo Seiko Ltd. and Koyo Corp. of America (collectively "Koyo") claim (1) Commerce violated its international obligations by applying the "arm's-length" test to exclude certain home market sales to affiliated customers; (2) Commerce violated its international obligations by "zeroing" the margins on negative-margin transactions when calculating Koyo's weighted average dumping margins; and (3) Commerce erred in its treatment of imputed expenses in the calculation of profit for Koyo's CEP sales.[1]

Domestic producer The Timken Company ("Timken") argues that (1) Commerce improperly calculated Koyo's constructed export price ("CEP") by applying adverse facts to Koyo's entered value, rather than Koyo's sales value; and (2) for purposes of a level of trade ("LOT") adjustment to NTN's normal values, Commerce erred in its decision to weight percentage differences in sales prices observed at different

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[1] Koyo initially also argued that Commerce erred by using "adverse facts available" for calculating margins on subject merchandise further processed in the United States. *See* Koyo's Am. Compl. at 4-5. Koyo reasoned that because it met the criteria described in 19 U.S.C. 1677a(e), Commerce was no longer authorized to request Section E data. *See* Koyo's Mem. Supp. Mot. J. Agency R. at 16-17 ("Koyo's Motion"); *see also* note 6, *infra*. As a result, Koyo believed its noncompliance was justified, and thus, application of adverse facts available would be improper. Koyo's Mot. at 13-14. Prior to oral argument, Koyo abandoned this claim. *See* Letter from Sidley, Austin, Brown & Wood to United States Court of International Trade at 1 (July 31, 2002).

levels of trade by the sum of the quantities of sales at both levels of trade, rather than the lesser of the sales quantities of the two LOTs being compared.[2]

In response to Timken's second claim, NTN argues that Timken's LOT adjustment claim presents no case or controversy, and therefore cannot be considered by this Court. *See* U.S. Const. Art. 3, § 2 (prohibiting issuance of advisory opinions).

Standard of review

The Court will uphold a final determination by Commerce in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

Discussion

I. Commerce's Application of Adverse Facts Available to Determine Koyo's Dumping Margin

A. Background

An antidumping duty is imposed upon imported merchandise if that merchandise is sold or likely to be sold in the United States at less than fair value, and an industry in the United States is materially injured or is threatened with material injury. *See* 19 U.S.C. § 1673. To determine whether

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[2] Timken also alleged in its complaint that "[t]he ITA made other clerical errors in calculating the final results that implicate business proprietary information or the calculation methodology used to reach the final results of the administrative review." Timken's Compl. ¶ 6(d). Timken's subsequent Rule 56.2 Motion, however, is limited to its disagreement with treatment of Koyo's further manufactured merchandise and NTN's LOT adjustment. In it's brief, Timken abandoned its other claims. NSK Ltd. and NSK Corp. asks that any action by Timken effecting NSK's rights in this matter be dismissed. Because "any claim which is not pressed is deemed abandoned," *De Laval Separator Co. v. United States*, 1 CIT 144, 146, 511 F.Supp. 810, 812 (1981), we dismiss Timken's action as to NSK.

merchandise is being sold at less than fair value, Commerce compares the price of the imported merchandise in the United States to the normal value ("NV")[3] for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b. The United States price is calculated using either the export price ("EP") or constructed export price ("CEP"). *See* 19 U.S.C. § 1677a(a), (b). Commerce uses a CEP if, "before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-826 (1994), *reprinted in* 1994 U.S.C.C.A.A.N. 4040, at 822 ("SAA").[4] Various adjustments may be made to CEP, including reduction by "the cost of any further manufacture or assembly" in the U.S. *See* 19 U.S.C. § 1677a(d)(2).

Here, Commerce chose to use CEP.[5] As there was value added to the subject merchandise in the United States after importation, Commerce required a Section E response from Koyo.[6] Koyo, however, chose not to file Section E of the questionnaire. *See* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 59 at 6 (May 2, 2000) ("Koyo's Refusal Letter"). As a result of Koyo's deliberate noncompliance, Commerce calculated Koyo's CEP

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[3] NV is "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i).

[4] The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[5] Commerce's decision to use CEP is unchallenged by any of the parties.

[6] Section E contains a request for sales and cost information for Koyo's further-manufactured sales. *See* Commerce's Request for Information at Section E, P.R. Doc. No. 14 at E-2.

using adverse facts available. Commerce chose as adverse facts available the rate of 41.04 percent. *Decision Mem.* at 8. This was the cash deposit rate established in the 1993-94 administrative review, *see Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 63 Fed.Reg. 20,585, 20,611 (Dep't Commerce 1998), and the highest rate ever calculated for Koyo in any segment of the A-588-604 case. *Decision Mem.* at 8. Commerce applied this rate to the entered value of Koyo's further-manufactured merchandise in order to calculate Koyo's CEP.

While Commerce's decision to use adverse facts is undisputed, Timken believes that Commerce's application of adverse facts to Koyo's entered value did not create a fully adverse inference. Timken's Mem. Supp. Mot. J. Agency R. at 12 ("Timken's Mem."). Timken points out that Commerce used the same methodology here as in previous administrative reviews in which Koyo also refused to supply further-manufactured information. *See id.* at 8-12; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 65 Fed.Reg. 11,767 (Dep't Commerce March 6, 2000) (1997-98 review period); 63 Fed.Reg. 2,558 (Dep't Commerce Jan. 15, 1998) (1995-96 review period). Timken argues that Koyo's earlier noncompliance with this methodology suggests that Commerce should alter the methodology in order to obtain Koyo's compliance. Timken's Mem. at 12. Timken suggests that Commerce should apply the percentage rate to Koyo's U.S. sales values, which would result in a higher dumping margin. *Id.* at 10. In essence, Timken argues that Commerce should have applied "a more adverse 'facts available'" to calculate Koyo's dumping margin. *Id.* at 12-13.

Commerce rejected Timken's approach, explaining that the application of the 41.04 rate to Koyo's sales value would be unduly punitive. *Decision Mem.* at 8. Commerce also points out that "Timken has failed to offer arguments or provide record evidence demonstrating that the rate selected is not reasonably adverse." *Id.*

B. Analysis

Commerce's application of the adverse facts available rate to the entered value rather than the sales value is consistent with Commerce's regulation for determining assessment rates, which states that Commerce "normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the *entered* value of such merchandise for normal customs duty purposes." 19 CFR § 351.212(b)(1) (emphasis added). Additionally, this Court has previously decided that CEP can be calculated by applying adverse facts available to a party's entered value when there is further manufacturing.[7] *See NTN Bearing Corp. of Am. v. United States*, 26 CIT __, __, 186 F.Supp.2d 1257, 1315 (2002) (sustaining Commerce's application of adverse facts available rate to Koyo's entered value to determine the CEP of Koyo's further manufactured merchandise).[8] We find no reason to change our position on this matter.

Even though the issue and parties are identical, Timken argues that this Court's ruling in *NTN Bearing II* does not

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[7] The Court's previous decision to uphold the application of adverse facts available to the entered value of subject merchandise was in response to motions from the same parties as in this case.

[8] We refer frequently to several cases entitled *NTN Bearing Corp. v. United States*. Only two of these cases are discussed extensively. References to these two cases will be abbreviated in chronological order. *See NTN Bearing Corp. of Am. v. United States*, 25 CIT __, __, 155 F.Supp.2d 715 (2001), *appeal docketed*, Nos. 02-1180, 02-1181 (Fed.Cir. Feb. 5, 2002) ("*NTN Bearing I*"); *NTN Bearing Corp. of Am. v. United States*, 26 CIT __, __, 186 F.Supp.2d 1257 (2002) ("*NTN Bearing II*").

preclude application of adverse facts available to Koyo's sales value. Timken's Reply Br. Supp. Mot. J. Agency R. at 15. Timken suggests that the difference is in Commerce's knowledge: before *NTN Bearing II*, Commerce could not have known Koyo would repeatedly decline to comply with Commerce's requests for Section E data, whereas after *NTN Bearing II*, Commerce should have known that Koyo's noncompliance would continue. *Id.* at 16. In other words, Timken argues, Commerce should alter its methodology (i.e. apply the percentage rate to sales values instead of entered values) in order to effectively induce Koyo's compliance. *Id.*

This argument is flawed for several reasons. First, Commerce has increased Koyo's rate since *NTN Bearing II*, from 36.21 percent, *see Tapered Roller Bearings*, 63 Fed.Reg. at 2,562, to the rate of 41.04 percent used here. Timken's argument that Commerce's methodology does not attempt to induce Koyo's compliance fails to recognize the higher dumping margin imposed by this higher rate.

Second, although it is true that Commerce applied the same rate of 41.04 percent in this review as it did in a previous administrative review for Koyo that took place after *NTN Bearing II*, *see* Issue and Decision Mem., *Tapered Roller Bearings*, 65 Fed.Reg. 11,767 at Comment 1, Commerce is "not required by the statute to select a method that is 'the most' or 'more' reasonably adverse." *See NTN Bearing II*, 26 CIT at __, 186 F.Supp.2d at 1315 (agreeing with Commerce that it need not apply the most or more adverse facts) (internal citations and quotations omitted). Rather, Commerce should adhere to the overriding goal of the antidumping law, which is not to create a punitive result, i.e., "unreasonably high rates with no relationship to the respondent's actual dumping margin," *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir.2000) ("De Cecco"), but rather to create a result that determines "current margins as accurately as possible."

Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed.Cir.1990); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed.Cir.1995).

In using the 41.04 percent rate and applying that rate to Koyo's entered value, Commerce is appropriately balancing this goal of accuracy against the risk of creating a punitive margin. Commerce specifically declined to apply adverse facts to Koyo's sales value because it believed that such an application "would be unduly punitive, given that a substantial amount of value was added to the imported components in the United States." *Decision Mem.* at 8. Commerce reasonably denied Timken's suggestion to apply adverse facts to a value that has been substantially increased after importation because such an application could result in an unreasonably high dumping margin. Commerce's decision therefore adheres to the purpose of and restrictions on adverse facts available. *See De Cecco,* 216 F.3d at 1032; *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT __, 206 F.Supp.2d 1323 (2002).

Timken questions Commerce's ability to determine that Timken's suggested approach would be punitive, because Koyo failed to supply any information upon which Commerce could make a fact-based estimate. Timken's Mem. at 14. However, Commerce has "extensive experience with and knowledge of Koyo's further-manufactured sales and the calculation of the value added in the United States with respect to these sales." *Decision Mem.* at 6. Additionally, Koyo submitted data to Commerce, which Commerce verified, demonstrating that the value added in the United States substantially exceeds the value of the imported merchandise. *See* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 37 (Feb. 11, 2000), *amended by* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 59 at 2 (Oct. 2, 2000); Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 55 at 2

(October 24, 2000). Therefore, even without Koyo's Section E response, Commerce still had enough information to make a reasonable assessment of the impact of applying adverse facts. Commerce is "in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032.

Finally, because Commerce determined that "a substantial amount of value was added to the imported components in the United States," Timken's suggested methodology—that Commerce apply its adverse facts to Koyo's sales value—would effectively apply a dumping margin to value added after the merchandise was imported into the United States. *Decision Mem.* at 8. Such a result is contrary to the purpose of the anti-dumping investigation, which is to "determine whether dumping duties should be imposed on subject merchandise *when it is imported into* the United States." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1374 (Fed.Cir.2001) (emphasis added).

In sum, Timken offers no evidence demonstrating that the rate selected is not reasonably adverse, nor any well-founded claim that Commerce's chosen methodology is not in accordance with law. For these reasons, this Court upholds Commerce's application of adverse facts available to Koyo's entered value as supported by substantial evidence and in accordance with law.

II. Level of Trade ("LOT") Adjustment for NTN

Because normal value is based on exporting country ("EC") sales at the same LOT as the EP or CEP,[9] 19 U.S.C.

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[9] Sales are made at different levels of trade "if they are made at different marketing stages (or their equivalent)." Antidumping Manual, Chap. 8 at 53; 19 C.F.R. § 351.412(c)(2).

§ 1677b(a)(7) directs Commerce to adjust normal value to account for any price differential between sales at different LOTs. In order to determine the amount of the adjustment, "Commerce for each NTN model sold at both LOTs in the [home market] calculated the difference between the weighted-average prices at the two LOTs as a percentage of the weighted-average price at the comparison LOT." Def.'s Mem. Opp'n Pls' Mot. J. Agency R. at 26 ("Def.'s Mem."); 19 C.F.R. § 351.412(e).[10] The LOT adjustment was then calculated by applying the weighted-average percentage price difference to the normal value determined at the comparison LOT. Def.'s Mem. at 26; *see generally* Mem. from Deborah Scott, Case Analyst, *Analysis Memorandum For Preliminary Results of the 1998-99 Review—NTN Corporation*, P.R. 117 (Oct. 31, 2000).[11]

Here, Commerce adjusted NTN's EP sales for price differentials accounted for by different levels of trade. Timken argues that Commerce's computer program used the sum of the sales of models at both levels of trade to weight

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[10] Commerce's implementing regulation for LOT adjustments provides:

> (e) *Amount of adjustment.* The Secretary normally will calculate the amount of a level of trade adjustment by:
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> (1) Calculating the weighted-averages of the prices of sales at the two levels of trade identified in paragraph (d), after making any other adjustments to those prices appropriate under section 773(a)(6) of the Act and this subpart;
>
> (2) Calculating the average of the percentage differences between those weighted-average prices; and
>
> (3) Applying the percentage difference to normal value, where it is at a different level of trade from the export price or constructed export price (whichever is applicable), after making any other adjustments to normal value appropriate under Section 773(a)(6) of the Act and this subpart.

19 C.F.R. § 351.412(e).

[11] This practice has been applied consistently by Commerce.

prices, and that this practice produces erroneous results and provides respondents with an opportunity to "game the system with isolated single sales." Timken's Mem. at 22.[12] Rather, according to Timken, Commerce should weight the price based on the actual number of instances where there are actual price differences. *Id.* at 21-23. Timken poses several hypothetical sets of facts that it claims demonstrate that Commerce's methodology produces distorted results. *See, e.g., id.* at 22-23.

Timken's hypothetical examples, however, do not prove that Commerce's methodology for calculating the LOT adjustment produces distortive and therefore unreasonable results in this instance. Aside from providing the hypothetical examples, Timken does not offer any evidence that Commerce's weighted averages for NTN in this review were distorted. Nor does Timken accuse NTN of attempting to "game the system;" rather, Timken argues that it is possible that some unspecified party could take advantage of the system.

Moreover, in promulgating its implementing regulation, 19 C.F.R. § 351.412(e), Commerce considered proposals similar to Timken's, that it "should base the amount of any adjustment on the pattern of consistent price differences, rather than on a weighted average." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. 27,296, 27,372 (May 19,

[12] NTN Bearing claims that Timken presents "no case or controversy" and is asking for an "advisory opinion." NTN's Resp. to Timken's Mem. Supp. Mot. J. Agency R. at 4. "In order to satisfy the case or controversy requirement 'a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.'" *Verson v. United States*, 22 CIT 151, 153, 5 F.Supp.2d 963, 966 (1998) (quoting *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983)). While Timken does not cite to specific record evidence regarding NTN, Timken does argue that Commerce's LOT adjustment produces erroneous results whenever it is used, including Commerce's application of the test to NTN's LOT adjustment. Therefore, a case or controversy does exist.

1997) (discussion of section 351.412(e)). Commerce, however, made a policy decision based on the SAA guidelines and rejected this approach. The SAA provides that "[a]ny adjustment under Section 773(a)(7)(A) [19 U.S.C. 1677b(a)(7)(A)] will be calculated as the percentage by which the weighted-average prices at each of the two levels of trade differ in the market used to establish normal value." SAA at 830. Because Commerce's policy choice is reasonable, until a party presents actual evidence that the application of Commerce's methodology is distortive and unreasonable, this Court will respect the agency's legitimate policy decision. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed.Cir.1992).

III. Commerce's Application of the 99.5 Percent Arm's Length Test

As noted above, "normal value" is defined as "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). The Department's regulations direct it to use sales data to calculate normal value if the Department is "satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller," 19 C.F.R. § 351.403(c), thereby only including data from sales made at arm's length, i.e., in the ordinary course of trade.

Commerce has consistently applied 19 C.F.R. § 351.403(c) through a "99.5 percent arm's-length test." Under this test, the Department compares, on a model-specific basis, the weighted average prices of home market sales of subject merchandise to affiliated customers with the weighted average prices of home market sales of the same model to unaffiliated customers. All home market sales to affiliated customers the weighted average prices of

which are less than 99.5 percent of the weighted average prices of sales to unaffiliated customers are excluded from the calculation of normal value. Sales to affiliated customers at prices that are higher than 99.5 percent of the weighted average price of sales to unaffiliated customers are automatically included, unless the party can prove that those sales are aberrationally high.

In the Final Determination, the Department excluded sales by Koyo to affiliates that failed the Department's "arm's-length" test. All sales at prices above 99.5 percent of the weighted average price to unaffiliated customers, however, were included in the calculation of Koyo's dumping margin. Koyo claims that Commerce's application of the arm's-length test violates Article 2.1 of the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade ("Anti-Dumping Agreement"), as interpreted in recent WTO dispute resolution proceedings, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (Feb. 28, 2001) ("Hot Rolled Steel Panel Report") and WT/DS184/AB/R (July 24, 2001) ("Hot Rolled Steel Appellate Body Report"). *See* Koyo's Mot. at 5-6.

Commerce claims that its arm's length test should be upheld because this Court has previously sustained the test and because Koyo is precluded from seeking a remedy in this Court based on the Anti-Dumping Agreement, pursuant to 19 U.S.C. § 3512(c) and § 3538. Timken also argues that Koyo failed to exhaust its administrative remedies by never raising this issue during the proceeding before the Department.[13]

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[13] Although the Department argues that Koyo failed to exhaust its administrative remedies for several other claims in Koyo's complaint, there is no mention of this argument by the government with regards to the "arm's-length" test.

A. Exhaustion

As a preliminary matter, the Court addresses Timken's claim that Koyo failed to exhaust its administrative remedies. "The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Timken Co. v. United States*, 26 CIT __, __, 201 F.Supp.2d 1316, 1340 (2002). There is, however, "no absolute requirement of exhaustion in the Court of International Trade in non-classification cases." *Consol. Bearings Co. v. United States*, 25 CIT __, __, 166 F.Supp.2d 580, 586 (2001). Rather, Congress vested the Court with discretion, pursuant to 28 U.S.C. § 2637(d), to determine the circumstances under which it is appropriate to require the exhaustion of administrative remedies.

A party "may be excused from its failure to raise the issue before Commerce [where] Commerce in fact considered the issue." *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT __, __, 131 F.Supp.2d 104, 114 (2001). The same aspects of the arm's-length test at issue here were raised by NTN in the administrative proceeding below. The danger of the Court deciding the issue before the Department has the opportunity to examine it at the administrative level is not present because the Department did indeed consider and reject an identical claim. *Id.; see also Decision Mem.* at 26-27. Therefore, even though Koyo may have failed to raise the issue in the administrative proceeding, it does not appear reasonable to require further exhaustion in this case.

Moreover, "the Court has exercised its discretion to obviate exhaustion where: (1) requiring it would be futile;" (2) "a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might materially affect the agency's actions;" (3) "the question is one of law and does not require further factual development and, therefore, the court does not

invade the province of the agency" by considering the question; or (4) plaintiffs "had no reason to suspect that the agency would refuse to adhere to 'clearly applicable precedent.'" *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT at __, 131 F.Supp.2d at 114.

Here, neither the WTO Panel Report nor the Appellate Body Report were issued until after Koyo filed its brief with the Department.[14] To require a party to anticipate the outcome of WTO decisions would be an unreasonable application of the exhaustion requirement. Although WTO Panel Reports and Appellate Body Reports are not binding on this Court, they may help inform the Court's decisions, and therefore it is appropriate to review Koyo's challenge to the Department's application of its arm's length policy in this matter.

B. 19 U.S.C. § 3512(c)

The Department does not address Koyo's argument that the "arm's-length" test violates 19 U.S.C. § 1677b's "fair comparison" requirement and therefore contradicts obligations pursuant to the Antidumping Agreement. Rather, Commerce focuses on 19 U.S.C. § 3512(c), arguing that the statute prohibits private parties from challenging government action on the basis that it violates a WTO agreement. Koyo, however, is not bringing this action under any WTO agreement; rather, Koyo is arguing that the Department's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement.

Koyo is certainly "free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so." *Gov't of Uzbekistan v. United States*, 2001 WL 1012780, *3 (CIT Aug. 30, 2001).

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[14] Koyo filed its case brief with the Department on December 7, 2000. The WTO Panel report, however, was not issued until February 28, 2001 and the Appellate Body report was issued on July 24, 2001.

As in *Uzbekistan*, the Department's reliance on section 3512(c) is an "erroneous technical bar." *Id.* Therefore, Koyo's claim is appropriately before us.

C. WTO Panel Reports

The interaction between international obligations and domestic law is interesting and complex. While an unambiguous statute will prevail over a conflicting international obligation, *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (1995), an ambiguous statute should be interpreted so as to avoid conflict with international obligations. *See Murray v. Schooner Charming Betsy*, 2 Cranch 64, 6 U.S. 64, 2 L.Ed. 208 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."). In the case of statutory interpretations by agencies, however, judicial review must take place within the confines of either *Chevron* or *Skidmore* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (discussing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944)); *but cf. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (holding that *Chevron* may yield to the *Charming Betsy* doctrine).

This Court does not automatically assume that the WTO Panel and Appellate Body decisions are correct interpretations of United States obligations pursuant to the GATT. Rather, they are non-binding decisions, *Hyundai Elec. Co., Ltd. v. United States*, 23 CIT 302, 311, 53 F.Supp.2d 1334, 1343 (1999), the reasoning of which may help inform this Court's decision.[15] 23 CIT at 312, 53 F.Supp.2d at 1343.

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[15] The ministerial body of the WTO is the only body that can interpret an Appellate Body report. *See* SAA at 662. Furthermore, the response to "an

Here, the WTO Appellate Body found that Commerce's 99.5 percent arm's-length test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade,'" found in Article 2.1 of the Anti-Dumping Agreement. Hot Rolled Steel Appellate Body Report ¶ 158 (quoting Hot Rolled Steel Panel Report ¶ 7.112). Article 2.1 of the Anti-Dumping Agreement provides:

> For the purposes of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

However, neither the WTO Panel nor the Appellate Body found that 19 U.S.C. § 1677b or 19 C.F.R. § 351.403[16] violated the Anti-Dumping Agreement. Rather, the two panels determined that the Department's policy of applying the 99.5 percent arm's-length test resulted in an inflated normal value and lacked "even-handedness." Hot Rolled Steel Appellate Body Report ¶ 154. According to the panels, because all high-priced sales are included, unless the exporter demonstrates through a difficult process that a given sales price is aberrationally high, sales that are not in the ordinary course of trade are often included in the antidumping calculation. Furthermore, the Appellate Body noted that the Department "does not have any standard, nor even guidelines,

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adverse WTO panel report is the province of the executive branch and, more particularly, the Office of the U.S. Trade Representative." *Hyundai Elecs. Co., Ltd.*, 23 CIT at 312, 53 F.Supp.2d at 1343; 19 U.S.C. § 3538.

[16] As noted above, the Department's regulations provide that it "may calculate normal value based on that sale [to an affiliated party] only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c).

for determining the threshold of aberrationally high" sales. *Id.* at ¶ 151. Moreover, it was "not clear to [the Appellate Body] that exporters would have known of the rule applied to high-priced sales." *Id.* at ¶ 155. The result, according to the WTO decisions, disadvantages exporters. [17]

The WTO decisions found, and this Court agrees, that the statute and the Department's regulation are consistent with the Anti-Dumping Agreement. As a result, no direct conflict exists between provisions of U.S. law and international obligations. Therefore, we focus solely on the Department's

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[17] The Appellate Body recommended that "the United States bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *WTO Agreement*, into conformity with its obligations under those Agreements." Hot Rolled Steel Appellate Body Report ¶ 241. The United States stated its intention to implement the recommendations and rulings of the Dispute Settlement Body in the Hot-Rolled Steel rulings. "After the DSB adopted its recommendations and rulings on August 23, the United States stated its intention to implement them in a manner consistent with its WTO obligations and engaged in discussions with Japan pursuant to Article 21.3(b) in an effort to reach agreement on the reasonable period of time for U.S. implementation." Submission of the United States, Arbitration on the "Reasonable Period of Time," *United States—Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan,* ¶ 1 (Jan. 4, 2002). During oral argument for the arbitration proceeding determining the proper amount of time for implementation of the Appellate Body decision, the United States represented "that modification of the '99.5 percent' or 'arm's length' test applied in practice by its administrative officials has already been commenced." Arbitration, *United States—Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan,* WT/DS184/13 (Feb. 19, 2002) ¶ 33. (holding that the period of time for implementation "which covers both legislative and administrative phases . . ." will accordingly expire on 23 November 2002). Furthermore, on August 15, 2002, the Commerce Department, in the Federal Register, published a request for comments on a proposed change in its arm's length policy. As a result, this Court is in the unfortunate position of reviewing a policy that Commerce has already decided to modify. Nothing in this opinion should be construed as limiting the Department's obligations in this regard.

policy interpreting its statute and regulations. However, the ambiguity of the statutes and regulations as to the definition of "ordinary course of trade," precludes a *Chevron* step-one analysis.[18] Accordingly, the court must determine if the Department's interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy*.

This Court has previously upheld Commerce's arm's-length test as a reasonable method for establishing a fair basis of comparison between affiliated and unaffiliated party sales. *See, e.g., Usinor Sacilor v. United States*, 18 CIT 1155, 1158-59, 872 F.Supp. 1000, 1004 (1994); *Micron Tech. Inc. v. United States*, 19 CIT 829, 846-47, 893 F.Supp. 21, 37-38 (1995). Although several parties have argued that the test fails to discover whether the investigated party actually manipulated prices charged to a related party, this Court held that it would continue to "uphold Commerce's arm's length test unless the test was shown to be unreasonable because it distorted price comparability." *SSAB Svenskt Stal AB v. United States*, 21 CIT 1007, 1010, 976 F.Supp. 1027, 1030 (1997). The Court has also explicitly rejected the notion that the arm's length test is flawed because it does not take into account certain qualitative factors other than price. *NSK Ltd. v. United States*, 21 CIT 617, 628-29, 969 F.Supp. 34, 48 (1997). These cases, however, do not appear to consider whether it is reasonable to apply a test that automatically

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[18] As discussed *supra* page 1239, determination of whether the agency's statutory interpretation is in accordance with law follows the two-step analysis formulated in *Chevron*, 467 U.S. at 837, 104 S.Ct. 2778. If the statute is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. If the statute is ambiguous and is expressed in a format that carries the "force of law," *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), the agency's interpretation of the statute is entitled to deference as long as it is reasonable. *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778.

excludes prices below 99.5 percent while automatically including prices above 99.5 percent.

Investigating authorities, pursuant to their obligations under the Anti-Dumping Agreement, need to verify whether sales are made in the ordinary course of trade. The authorities cannot presume that all affiliate sales are outside the ordinary course of trade; in some circumstances, this may not be the case. As the WTO panels note, however, "in the ordinary course of trade" is not a phrase defined by the Antidumping Agreement. Therefore, investigating authorities have the discretion to choose different methods of testing whether a sale is made within the ordinary course of trade.

Here, Commerce determined that the 99.5 percent arm's length test appropriately excludes sales made outside the ordinary course of trade. The Department excludes sales for which the price ratio is less than 99.5 percent because "on average, that customer was paying less than unrelated customers for the same merchandise." *Usinor Sacilor*, 18 CIT at 1157, 872 F.Supp. at 1003 (1994) (internal citations and quotations omitted). The Appellate Body agreed that "a pattern of prices to affiliated customers, different from the pattern of prices to unaffiliated customers, could indicate that sales were not in the ordinary course of trade." Hot Rolled Steel Appellate Body Report ¶ 135. We agree with the Department that it is reasonable to presume that affiliate sales with a pattern of below average prices are not in the ordinary course of trade. The Appellate Body, however, expressed concern over the fact that the 99.5 percent arm's length policy only determines whether sales to affiliates are, on average, at lower prices than sales to unaffiliated parties, not whether prices might be on average higher to affiliates. Accordingly, what this Court must next consider is whether higher priced sales should be automatically included.

Although higher priced sales are presumed to be included in the calculation of normal value, they may be excluded

upon a showing that they are aberrationally high. The Appellate Body was concerned that "[t]he rule applied to high-priced sales . . . was not contained in any guidelines, or other document conveyed to the interested parties. It is, therefore, not clear to us [the Appellate Body] that exporters would have known of the rule applied to high-priced sales." *Id.* at ¶ 155. Here, however, Koyo concedes that it had notice that Commerce excluded sales demonstrated to be "aberrational." Oral Arg. Trans. at 9-11 (Aug. 2, 2002). In fact, in this same administrative review, NTN tried to demonstrate that some of its high profit sales were outside the ordinary course of trade. *See* Timken's Oral Arg. Ex. 3.

Commerce argues that the investigated parties should have the burden of establishing that high priced sales between affiliated parties are not in the ordinary course of trade. According to Commerce, once a party establishes that the high priced sales are aberrational, the sales are excluded from the calculation of normal value. Commerce applies this asymmetric test because it assumes that investigated parties will supply advantageous information, such as why a high priced sale between affiliated parties is not in the ordinary course of trade, but will be reluctant to supply information that is disadvantageous, such as why low priced sales between affiliated parties are not in the ordinary course of trade. Furthermore, according to Commerce, "[t]he purpose of an arm's length test is to eliminate prices that are distorted. We test sales between two affiliated parties to determine if prices may have been manipulated to lower normal value." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. 27,296, 27,356 (May 19, 1997).

It may be that Commerce's application of the 99.5 percent arm's length test could, in another case, lack even-handedness and disadvantage exporters so as to be inconsistent with international obligations under the Anti-Dumping Agreement. In this case, however, we do not find, nor does Koyo argue,

that the application of the 99.5 percent arm's length test results in the inclusion of sales outside the ordinary course of trade in the calculation of Koyo's normal value. Accordingly, because in this case investigated parties control the data at issue, we uphold Commerce's application of its statutes and regulations as a reasonable interpretation of "ordinary course of trade."

IV. Commerce's Practice of Zeroing Negative Margins

Koyo also argues that the Department erred by refusing "to give full mathematical effect to the negative margins . . . in calculating Koyo's (and other respondents') weighted average margins, by setting the negative margins on those transactions at zero." Koyo's Mot. at 34. Koyo points to a recent Appellate Body decision, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("EC-Bed Linen Appellate Body Report"), in arguing that this practice is inconsistent with the Anti-Dumping Agreement. *Id.*

As with the "arm's-length" test, the Department argues that Koyo is barred from seeking a remedy in this Court pursuant to 19 U.S.C. § 3512(c). The Department also claims that WTO cases are not binding on this Court and, more importantly, that to date, the WTO cases have not decided the issue with respect to the zeroing practice of the U.S. Finally, Timken claims that the zeroing practice actually ensures a more accurate antidumping margin.

As discussed above, 19 U.S.C. § 3512(c) does not bar Koyo's claim. This action is commenced under U.S. law, and a party may reasonably assume that the agency will interpret U.S. law so as to avoid a conflict with international obligations.

EC Bed-Linen involved the European Community's practice of zeroing "when establishing 'the existence of

margins of dumping.'" EC Bed-Linen Appellate Body Report ¶¶ 45(a), 47. The Appellate Body found EC's "zeroing" practice to be inconsistent with Article 2.4.2 of the EC Anti-Dumping Agreement.[19] Koyo argues that the EC's practice is similar to the one used by the Department.

As Koyo concedes, the Department's zeroing practice has previously been affirmed by this Court, which found it to be a reasonable interpretation of 19 U.S.C. § 1673. *Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 11 CIT 866, 874, 675 F.Supp. 1354, 1360-61 (1987); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 558, 572, 926 F.Supp. 1138, 1150 (1996). The Court, however, has also stated that it would only continue to uphold the Department's practice of zeroing "until it becomes clear that such a practice is impermissible." *Bowe Passat*, 20 CIT at 572, 926 F.Supp. at 1150.

The *EC Bed Linen* report does not invalidate Commerce's zeroing practice. The Appellate Body decision involved a dispute between India and the European Communities, and did not comment on U.S. practices. To date, no comparable WTO case has been decided concerning U.S. zeroing practices. Moreover, although the EC's zeroing practice

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[19] Article 2.4.2 of the Anti-Dumping Agreement provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

appears similar to the United States' practice, this Court cannot determine from the Appellate Body report whether they are the same. As noted above, according to the SAA, only the ministerial body of the WTO can interpret an Appellate Body report. *See* SAA at 662 (discussing procedures for making decisions). It is therefore not the province of this Court to determine the extent of the similarities between EC and U.S. zeroing practices based on the Appellate Body decision.

Furthermore, the *EC-Bed Linen* decision involved a comparison, made during an antidumping investigation, of weighted averages for export prices and normal value, while the instant case involves a comparison, made during an administrative review, of weighted-average normal values to transaction-specific export prices. *Decision Mem.* at 33. The Appellate Body was limited to interpreting Article 2.4.2. An administrative review, such as the one at issue here, however, is governed by Article 9.3.1 of the Anti-Dumping Agreement.[20] Although the two proceedings are related, involving the calculation of anti-dumping margins, differences exist between them and each investigation is informed by a different article of the Anti-Dumping Agreement. Here, the statutes require Commerce to calculate a "dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A)(ii).

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[20] Article 9.3.1, provides:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of the anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this subparagraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

Anti-Dumping Agreement, art. 9.3.1.

"Dumping margin" is defined by 19 U.S.C. § 1677(35)(A) as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." As the statute requires the calculation to be on an entry-by entry approach, and as previous cases determined, Commerce's practice is a reasonable interpretation of 19 U.S.C. § 1675(a)(2)(A), and continues to be a reasonable interpretttation of the statute despite the WTO Panel report. Therefore, *EC-Bed Linen* does not inform the Court on the issue of an administrative review of an existing order.

Therefore, the Appellate Body's decision in *EC-Bed Linen* does not compel a change to this Court's holding in *Bowe Passat*, 20 CIT at 572, 926 F.Supp. at 1150, that the Department's zeroing practice is upheld "until it becomes clear that such practice is impermissible."

V. Commerce's Treatment of Imputed Expenses in the Calculation of Koyo's Constructed Export Price

Koyo argues that the Department's treatment of imputed expenses in the calculation of constructed export price ("CEP") sales is not in accordance with law. The Department contends that the Court should not consider Koyo's challenge because Koyo failed to exhaust its administrative remedies and, even if this Court does consider Koyo's challenge, the Department properly excluded imputed credit and inventory carrying costs in its calculation of CEP.

A. Exhaustion

As previously discussed, *supra* page 1238, there is "no absolute requirement of exhaustion," except in classification cases. *Consol. Bearings Co. v. United States*, 25 CIT at __, 166 F.Supp.2d at 586. The court has the discretion to excuse the failure to exhaust administrative remedies "where appropriate," including when it would be futile to follow the administrative remedy. 28 U.S.C. § 2637(d). Exhaustion is

futile when the agency (1) consistently applies the challenged policy or methodology; (2) issues rules, regulations or bulletins promulgating such policy or methodology; and (3) rejects similar challenges. *See Koyo Seiko Co. v. United States*, 26 CIT __, __, 186 F.Supp.2d 1332, 1339 (quoting *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir.1980)). According to Koyo, "the well-established 'futility' exception to the exhaustion requirement" applies here. Koyo's Reply Br. Supp. Mot. J. Agency R. at 27; *see also Asociacion Colombiana de Exportadores v. United States*, 916 F.2d 1571, 1575 (Fed.Cir.1990) (explaining that "following the administrative remedy would be futile because of certainty of an adverse decision") (internal citations and quotations omitted).

The Department's practice for calculating CEP profit is well-established. In 1997, the Department issued a policy bulletin explaining its methodology for the calculation of profit for CEP transactions. *See Import Administration Policy Bulletin 97-1: Calculation of Profit for Constructed Export Price Transactions* at Step 2. The bulletin made clear that the Department's policy is to include imputed costs such as inventory carrying costs and credit costs in "total U.S. selling expenses" but not in "total expenses." *Id.* Furthermore, the Department has consistently excluded imputed expenses from "total expenses" while including them in "total U.S. selling expenses" in other antidumping proceedings. *See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 64 Fed.Reg. 35,590, 35,623 (July 1, 1999) (final determ.); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 62 Fed.Reg. 54,043, 54,072 (Oct. 17, 1997) (final admin. rev.). Accordingly, as Commerce's position has been both issued formally, as a policy bulletin, and consistently applied, we conclude that the policy is so well-established that it would have been futile for Koyo to raise the issue in the administrative proceeding below. *See NTN*

Bearing Corp. I, 155 F.Supp.2d at 743. As a result, the Court finds that Koyo was excused from exhausting its administrative remedies in this case.

B. Accordance with Law

Title 19 U.S.C. § 1677a(f) defines "total United States expenses" and "total expenses." "Total United States expenses" refers to "the total expenses described in subsection (d)(1) [commissions for selling the subject merchandise in the U.S., expenses resulting from and bearing a direct relationship to the sale, any selling expenses that the seller pays on behalf of the purchaser and any other selling expenses] and (2) [cost of further manufacture or assembly] of this Section." "Total expenses," on the other hand, includes, in relevant part:

> all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:
>
> (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
>
> (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.
>
> (iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

19 U.S.C. § 1677a(f)(C). In interpreting these two provisions, Commerce includes imputed credit and inventory costs in U.S. total expenses as an expense having a direct relation to the sale. Commerce, however, does not impute credit and inventory expenses in total expenses where total expenses include actual credit and inventory costs.

In *NTN Bearing I* this Court addressed the Department's practice of excluding imputed expenses from "total expenses" but including them in "total U.S. expenses." The *NTN Bearing I* court found that the Department's practice ignored the plain language of the statute and that the Department must include imputed credit and inventory carrying costs in total expenses when they are included in total U.S. expenses. *NTN Bearing I*, 155 F.Supp.2d at 743. The Department, however, contends that *NTN Bearing I* is not dispositive of the issue because it conflicts with the appellate decision in *U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed.Cir.2000).

In *U.S. Steel Group*, the Court of Appeals for the Federal Circuit found that symmetry between "total expenses" and "total U.S. expenses" was not necessary, in which case movement expenses could be included in one but not the other. Furthermore, the court found that total U.S. expenses were not a subset of total expenses. The Department now argues that *U.S. Steel Group* stands for the proposition that symmetry need not exist in the ratio for CEP transactions used here.

Unlike the court in *NTN Bearing II*, we do not believe that the statute clearly addresses the use of imputed expenses in the calculation of total expenses or total actual profit. Furthermore, we believe, as held in *U.S. Steel Group*, that Congress defined total United States expenses and total expenses differently. We agree with the Department that although the court in *U.S. Steel Group* focused on "movement expenses," the reasoning of that case is applicable here.

The Federal Circuit in *U.S. Steel Group* looked at the relevant statutory provisions, 19 U.S.C. § 1677a, as a whole. The court held that "[t]he statute itself defines 'total U.S. expenses' distinctly, both structurally and substantively, from 'total expenses.'" 225 F.3d at 1289. Although the court focused on movement expenses, it still found that total expenses and total U.S. expenses were defined "very differently." Here, although the definitions of both total U.S. expenses and total expenses direct Commerce to include a figure for selling expenses, it is not clear from the statute that these figures need to be precisely the same.

Furthermore, even if *U.S. Steel* does not apply to selling expenses, Commerce's methodology is a reasonable interpretation of the statute. In this situation, Commerce included a category of expenses, inventory and credit costs, when calculating both total U.S. expenses in the numerator and total expenses in the denominator of the ratio. As this Court explained in *Thai Pineapple*, imputed selling expenses when included in calculating total U.S. expenses also need to be included in the calculation for total expenses "*unless* they are already represented in total expenses in some other fashion." *Thai Pineapple Canning Indus. Corp., Ltd. v. United States*, 23 CIT 286, 296, 2000 WL 174986 (2000), *aff'd in part, rev'd in part*, 273 F.3d 1077 (Fed.Cir.2001) ("*Thai Pineapple I*")[21] (emphasis added) (citing *U.S. Steel*, 15 F.Supp.2d at 898).[22] Here, Koyo provided Commerce with both

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[21] Although Commerce cites to *Thai Pineapple I* as adverse to its position we are of a contrary mind.

[22] *Thai Pineapple I* was remanded to Commerce in order for the agency to "demonstrate . . . that the total expense denominator of the ratio to be applied to total actual profit to obtain the CEP profit adjustment contains all interest expenses (including those relating to U.S. sales) as required by 19 U.S.C. § 1677a(f)(2)(C)." *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 2000 WL 174986, **5-6 (CIT Feb. 10, 2000) ("*Thai Pineapple II*").

"imputed" numbers representing inventory and credit costs on a per-model basis for U.S. sales and "actual" numbers for total credit and inventory costs.[23] Commerce excluded imputed credit and inventory carrying costs from total expenses and total actual profit because these expenses were already accounted for; total expenses merely uses actual figures while U.S. expenses uses imputed. Therefore, the category of expenses at issue—inventory and carrying costs—are included in both total expenses and total U.S. expenses. This is consistent with *U.S. Steel* and the *Thai Pineapple* cases. *See, e.g., Thai Pineapple I*, 23 CIT at 289, 2000 WL 174986 (holding that "imputed expenses should be omitted from actual profit if they duplicate expenses already accounted for").

This practice is further supported by Commerce's preference for the use of *actual* cost information rather than *imputed* cost information when possible. *See, e.g.*, Antidumping Manual, Chap. 8 at 23-25 ("Our preference is to use actual credit cost information if it is available. If actual expenses are not available, we impute the cost of credit. . . .").[24] Rather than using a proxy, actual figures for the interest expenses of inventory and credit costs were included in the calculation of total expenses and total actual profit. While the imputed numbers used in total U.S. expenses may not be exactly the same as those used in total expenses, one is a reasonable surrogate for the another.

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[23] Commerce requests respondents to report total interest expenses covering inventory carrying costs and credit extension expenses for cost of production purposes. "For price adjustment purposes, however, Commerce requires respondents to impute interest expenses separately for U.S. sales, even though companies may not account for such expenses separately." *Thai Pineapple II*, 2000 WL 174986, *6.

[24] It should be noted that while the *Antidumping Manual* "is not a binding legal document, it does give insight into the internal operating procedures of Commerce." *Koenig & Bauer-Albert AG v. United States*, 24 CIT __, __, 90 F.Supp.2d 1284, 1292 n. 13 (2000), *aff'd in part, vacated in part, remanded by* 259 F.3d 1341 (Fed.Cir.2001).

See, e.g., Thai Pineapple II, 2000 WL 174986, * 6 ("Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator . . . as well as 'home' market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination."). Moreover, "[c]ompanies may not keep track of the costs of maintaining inventory or extending credit to their customers on a per-model basis. Nonetheless, they are real costs that a company incurs. The Department asks respondents to provide measures of these costs, to 'impute' them for purpose of determining normal value and U.S. price." Timken's Resp. to Koyo's Mot. J. Agency R. at 39. Therefore, even if total U.S. expenses are a subset of total expenses for selling cost purposes, inventory and credit costs are accounted for in both parts of the ratio.

Accordingly, this Court, consistent with the federal circuit's analysis in *U.S. Steel Group*, upholds the Department's practice of excluding imputed expense in "total expenses" when actual expenses are used as that practice was applied here.

Conclusion

The Department's final results are, therefore, affirmed as being supported by substantial evidence and otherwise in accordance with law.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-1098, 03-1238

THE TIMKEN COMPANY,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellee,

v.

KOYO SEIKO CO., LTD. and KOYO CORPORATION OF U.S.A.,
Defendants-Appellants,

and

NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN CORPORATION, NSK LTD., and NSK CORPORATION,

Defendants.

March 17, 2004, Decided
March 17, 2004, Filed

JUDGES: Before NEWMAN, Circuit Judge, BRYSON, Circuit Judge, and PROST, Circuit Judge.

OPINION:

ORDER

A petition for rehearing having been filed by the APPELLANTS,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on March 24, 2004.

APPENDIX D

UNTIED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-1098, -1238

THE TIMKEN COMPANY,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellee,

v.

KOYO SEIKO CO., LTD. and
KOYO CORPORATION OF U.S.A.,

Defendants-Appellants,

and

NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN CORPORATION, NSK LTD., AND NSK CORPORATION,

Defendants.

ORDER

Upon consideration of the motion of defendants-appellants Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo") for recall and stay of this Court's mandate, it is hereby

ORDERED that Koyo's motion is granted; and it is further

ORDERED that the mandate issued pursuant to this Court's order dated March 17, 2004 in the above-captioned proceeding is hereby recalled; and it is further

ORDERED that the mandate of this Court shall be stayed pending the filing by Koyo of a petition for a writ of certiorari in the U.S. Supreme Court, and that during the period in which the mandate is stayed, the injunction pending appeal issued by the Court of International Trade on March 11, 2003, in *The Timken Co. v. United States* (Consol. Court No. 01-00127), shall remain in effect as to Koyo's entries; and it is further

ORDERED that this stay shall remain in effect for the time period set forth in Rule 41(2)(B) of the Federal Rules of Appellate Procedure.

SO ORDERED.

FOR THE COURT

DATE: APR 22 2004

/s/ Jan Horbaly/JB
JAN HORBALY
Clerk

[Filed APR 22 2004]

APPENDIX E

STATUTORY PROVISIONS

19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

* * * *

(June 17, 1930, c. 497, Title VII, § 731, as added July 26, 1979, Pub.L. 96- 39, Title I, § 101, 93 Stat. 162, and amended Oct. 30, 1984, Pub.L. 98-573, Title VI, § 602(b), 98 Stat. 3024; Dec. 8, 1994, Pub.L. 103-465, Title II, § 233(a)(1)(A), (2)(A)(i), 108 Stat. 4898.)

19 U.S.C. § 1677. Definitions; special rules

For purposes of this subtitle—

(1) Administering authority. The term "administering authority" means the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law.

* * * *

(34) Dumped; dumping. The terms "dumped" and "dumping" refer to the sale or likely sale of goods at less than fair value.

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin. The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin. The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

* * * *

(June 17, 1930, c. 497, Title VII, § 771, as added July 26, 1979, Pub.L. 96- 39, Title I, § 101, 93 Stat. 176, and amended Oct. 30, 1984, Pub.L. 98-573, Title VI, § 612(a), 98 Stat. 3033; Oct. 22, 1986, Pub.L. 99-514, Title XVIII, § 1886(a)(9), 100 Stat. 2922; Aug. 23, 1988, Pub.L. 100-418, Title I, §§ 1312, 1316(b), 1326(a) to (c), 1327 to 1330, 1335, 102 Stat. 1184, 1187, 1203 to 1207, 1210; Sept. 28, 1988, Pub.L. 100-449, Title IV, § 403(d), 102 Stat. 1887; Nov. 10, 1988, Pub.L. 100-647, Title IX, § 9001(a)(5), 102 Stat. 3807; Aug. 20, 1990, Pub.L. 101-382. Title I, § 139(a)(3), Title II,

§ 224(a), (b), 104 Stat. 653, 659, 660; Dec. 8, 1993, Pub.L. 103-182, Title IV, § 412(b), Title VI, 637(b), 107 Stat. 2146, 2203; Dec. 8, 1994, Pub.L. 103-465, Title II, §§ 221(b), 222, 229(b), 233(a)(3), (4), (5)(BB) to (FF), (b), 251, 266, 267, 270(c)(2), (e), 108 Stat. 4869, 4890, 4898, 4900, 4901, 4902, 4915, 4917, 4918; Oct. 11, 1996, Pub.L. 104-295, § 20(b)(7), (14), 110 Stat. 3527.)

19 U.S.C. § 1677b. Normal value

(a) Determination. In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

(1) Determination of normal value.

(A) In general. The normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price under section 1677a(a) or (b) of this title.

(B) Price. The price referred to in subparagraph (A) is—

(i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price, or

(ii) in a case to which subparagraph (C) applies, the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if—

(I) such price is representative,

(II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and

(III) the administering authority does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

(C) Third country sales. This subparagraph applies when—

(i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),

(ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or

(iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.

For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

(2) Fictitious markets. No pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account in determining normal value. The occurrence of different movements in the prices at which different forms of the foreign like product are sold (or, in the absence of sales, offered for sale) in the exporting country after the issuance of an antidumping duty order may be considered by the administering authority as evidence of the establishment of a fictitious market for the foreign like product if the movement in such prices appears to reduce the amount by which the normal value exceeds the export price (or the constructed export price) of the subject merchandise.

(3) Exportation from an intermediate country. Where the subject merchandise is exported to the United States from an intermediate country, normal value shall be determined in the intermediate country, except that normal value may be determined in the country of origin of the subject merchandise if—

(A) the producer knew at the time of the sale that the subject merchandise was destined for exportation;

(B) the subject merchandise is merely transshipped through the intermediate country;

(C) sales of the foreign like product in the intermediate country do not satisfy the conditions of paragraph (1)(C); or

(D) the foreign like product is not produced in the intermediate country.

(4) Use of constructed value. If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i), then, notwithstanding paragraph (1)(B)(ii), the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(5) Indirect sales or offers for sale. If the foreign like product is sold or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) by such affiliated party may be used in determining normal value.

(6) Adjustments. The price described in paragraph (1)(B) shall be—

(A) increased by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States;

(B) reduced by—

(i) when included in the price described in paragraph (1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser,

(ii) the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser, and

(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product, and

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—

(i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,

(ii) the fact that merchandise described in subparagraph (B) or (C) of section 1677(16) of this title is used in determining normal value, or

(iii) other differences in the circumstances of sale.

(7) Additional adjustments.

(A) Level of trade. The price described in paragraph (1)(B) shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export

price or constructed export price and normal value, if the difference in level of trade—

(i) involves the performance of different selling activities; and

(ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

(B) Constructed export price offset. When normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1766a(d)(1)(D) of this title.

(8) Adjustments to constructed value. Constructed value as determined under subsection (e) of this section, may be adjusted, as appropriate, pursuant to this subsection.

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(June 17, 1930, c. 497, Title VII, § 773, as added July 26, 1979, Pub.L. 96- 39, Title I, § 101, 93 Stat. 182, and amended Oct. 30, 1984, Pub.L. 98-573, Title VI, §§ 615, 620(b), 98 Stat. 3036, 3039; Oct. 22, 1986, Pub.L. 99- 514, Title XVIII, § 1886(a)(11), 100 Stat. 2922; Aug. 23, 1988, Pub.L. 100-

418, Title I, §§ 1316(a), 1318, 1319, 102 Stat. 1186, 1189; Dec. 8, 1994, Pub.L. 103-465, Title II, § 224, 108 Stat. 4878.)

APPENDIX F

WORLD TRADE ORGANIZATION

WT/DS264/R
13 April 2004
(04-1429)

Original: English

UNITED STATES—FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA (WT/DS264)

Report of the Panel

* * * *

I. CLAIM 6: ARTICLES 2.4 AND 2.4.2—ZEROING

(a) Factual Background

7.185 In the anti-dumping investigation underlying this dispute, DOC divided the product under investigation into groups of identical, or broadly similar, product types. After making certain adjustments within each product type, DOC calculated a weighted average normal value and export price for each product type, and then compared the weighted averages for each product type. This process resulted in multiple values, one for each product type. In some instances this comparison showed that the weighted average export price for a specific product type was less that the weighted average normal value, while in other instances, the comparison showed that the weighted average export price was greater than the weighted average normal value. These values were then aggregated to produce one single value, the margin of dumping for the product under investigation for each investigated exporter. In the aggregation process, a value of "zero" was attributed to those product comparisons where the weighted average export price was greater than the weighted average normal value. DOC then aggregated the positive values from the individual product type comparisons, that is, those instances where the weighted average export price was lower than the weighted normal value, and divided the result by the total value of exports, to arrive at a weighted average margin of dumping.

7.186 For ease of reference of the reader, but without giving any legal status to the concept, we will follow the approach of the parties by referring to those instances where the export price is greater than the normal value, as "negative dumping margins" or "negative dumping".[341] We will refer to the

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[341] We note that there might be differences on how this methodology is applied by different investigating authorities. However, when we refer to

process of attributing a "zero" value to the individual product type comparisons where the weighted average export price is greater than the weighted average normal value for the same product type as "zeroing".

* * * *

(c) Evaluation by the Panel

7.196 The issue before the Panel is whether the methodology used by DOC in the underlying anti-dumping investigation whereby it attributed a value of zero to those instances where the weighted average export price was greater than the weighted average normal value when aggregating the different values determined for the different product types to compute the overall margin of dumping, is consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *AD Agreement*.[343, 344]

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the term "zeroing", we refer to the methodology as applied by the DOC in the underlying anti-dumping investigation as described by DOC in Exhibit CDA-2, IDM, pp. 65-66.

[343] We note that, in the IDM, DOC justified its use of the methodology at issue by referring to Sections 771(35)(A) and 771(35)(B) of the US Tariff Act as follows:

> "[t]hese sections, taken together, direct [DOC] to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not apply on an aggregate basis". (Exhibit CDA-2, IDM, Comment 12, p. 66)

We do not understand Canada to challenge the above-referred sections of the US statute but DOC's application of zeroing when determining the overall margin of dumping for the Canadian exporters involved in the softwood lumber investigation. For this reason, we do not examine the consistency of Sections 771(35)(A) and 771(35)(B) with relevant provisions of the AD Agreement.

7.197 Article 2.4.2 of the *AD Agreement* provides in relevant part as follows:

> "[s]ubject to the provisions governing fair comparison in [Article 2.4], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.198 Article 2.4 provides in relevant part that:

> "[a] fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."

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[344] We do not understand Canada to dispute that DOC was entitled to make adjustments within each product type to ensure an "apples-to-apples" comparison within that product type, calculate a weighted average normal value and a weighted average export price for each product type, and compare the two.

7.199 Article 2.4 of the *AD Agreement* provides that a fair comparison shall be made between export price and normal value, and sets out specific parameters for how such comparisons are to be made. The two sub-paragraphs of Article 2.4 deal with specific aspects of the comparison of normal value and export price. Article 2.4.1—which is not at issue in this dispute—provides rules for the conversion of currencies, when such conversion is necessary for the purposes of a comparison under Article 2.4. Article 2.4.2 establishes that, subject to the requirement of a fair comparison, dumping margins should normally be established on the basis of a comparison between a weighted average export price to a weighted average normal value, or on the basis of a transaction-to-transaction comparison. A comparison between a weighted average normal value to individual export transactions is allowed only in limited circumstances.

7.200 The issue before us is whether zeroing is allowed when an investigating authority is calculating an overall margin of dumping under the first—weighted average-to-weighted average—methodology set forth in Article 2.4.2. We note that, in practice, the issue of zeroing arises in the context of the weighted average-to-weighted average methodology only where the investigating authority engages in so-called "multiple averaging", that is, where it sub-divides the product under investigation into groups and performs a weighted average-to-weighted average comparison for each group. Specifically, the issue of zeroing arises in the context of aggregating the results of these multiple comparisons into an overall margin for each exporter/producer for the product under investigation. Where only a single weighted average-to-weighted average comparison is performed, it seems to us that the issue of zeroing *per se* could not arise (although there might still be issues about the manner in which the averaging was performed).

7.201 In this case, DOC engaged in multiple averaging on the basis of differing physical characteristics of the product under investigation. As mentioned in paragraph 7.159, *supra*, DOC identified eleven physical characteristics and, with some exceptions, performed weighted average-to-weighted average comparisons only on the basis of transactions involving merchandise which shared these physical characteristics (this could be characterized as multiple averaging based on product type or model). Although multiple averaging based on different types or models may be particularly common, multiple averaging may also be used in other contexts. For example, an investigating authority might perform multiple averaging in respect of sales made at different levels of trade (e.g., retail versus wholesale) or on the basis of sub-periods of the period of investigation[345] (the latter may arise in cases where hyper-inflationary economies are involved). Thus, an investigating authority might well resort to multiple averaging to ensure comparability even in a case of absolute product homogeneity, i.e., where all of the product under investigation is identical and is being compared to transactions involving identical goods in the market of the exporting country.

7.202 There is no dispute between the parties as to the appropriateness or consistency with the *AD Agreement* of this multiple averaging approach to calculating dumping margins *per se*. To the contrary, Canada acknowledges that multiple averaging is permissible.[346] However, in light of the fact that multiple averaging is a prerequisite for the issue of zeroing to arise in the context of applying the weighted average-to-weighted average methodology, and taking into account the arguments of the parties and the reasoning developed by the Appellate Body in *EC—Bed Linen*[347], we consider that we

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[345] Panel Report, *US—Stainless Steel*, paras. 6.105-6.136.

[346] Canada response to question 30 of the Panel, para. 106 and Canada second written submission, para. 143.

[347] Appellate Body Report, *EC—Bed Linen*, paras. 46-66.

must examine the issue of multiple averaging if we are to arrive at reasoned conclusions regarding the question of zeroing in the context of a weighted average-to-weighted average comparison methodology.

7.203 We begin our analysis with Article 2.4.2, which provides that the existence of margins of dumping shall normally be established "on the basis of a comparison of a weighted average normal value with a weighted average of *all comparable* export transactions". (emphasis added) The word "comparable", in its ordinary meaning, indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions, but only to comparable export transactions. Further, we are required as treaty interpreters to assume that when the drafters included language in the treaty, that they intended that language to have some meaning.[348] If the drafters had intended to require that the existence of a dumping margin for a product always be calculated by comparing a single weighted average normal value and a single weighted average of prices of all export transactions, we do not believe that they would have included the word "comparable" in Article 2.4.2, as that word would serve no purpose in the text. The fact that the word "comparable" was added to the text of Article 2.4.2 towards the end of the negotiating process, confirms our view that it was included for a purpose and should not simply be disregarded as surplus verbiage.[349]

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[348] *See, e.g.*, Appellate Body Report, *US—Gasoline*, p. 23 where it is stated that:

> ". . . [o]ne of the corollaries of the 'general principle of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty".

[349] The insertion of the word "comparable" into Article 2.4.2 represented the only modification to the draft text of the Article between the date of the Draft Final Act and the text as adopted at the conclusion of the Uruguay Round, reflecting the current Article 2.4.2. (*See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade*

7.204 We are as treaty interpreters of course required to give meaning to all the terms of a treaty, and we must therefore arrive at an interpretation of Article 2.4.2 that gives meaning both to the words "all" *and* "comparable". In our view, however, there is no need to choose between the two terms. Rather, the phrase "all comparable export transactions" would in its ordinary meaning appear to signify that Members may only compare those export transactions which are comparable, but that it must compare *all* such transactions. Thus, the term "all" plays an important role in the provision by ensuring that Members do not exclude relevant transactions from their comparisons.

7.205 We note that a number of panels have expressed the view that multiple averaging is permitted by Article 2.4.2. The issue has been considered by both the *US—Stainless Steel* and *Argentina—Ceramic Tiles* panels. Both panels concluded that multiple averaging was permitted by Article 2.4.2 in appropriate circumstances.[350]

Negotiations, MTN.TNC/W/FA, 20 December 1991) We agree with the panel in *US—Stainless Steel* that this suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters. (Panel Report, *US—Stainless Steel,* para. 6.111, note 114)

[350] Panel Report, *US—Stainless Steel,* para. 6.111, where it is stated that:

> "[t]he inclusion of the word "comparable" is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions. It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value". (footnote omitted)

See also Panel Report, *Argentina—Ceramic Tiles,* para. 6.99, where it is stated that:

> "[w]e consider that the use of types or models is a valid method of ensuring a fair comparison between normal value and export price under Article 2.4".

7.206 We do not consider that, by definition, "all types or models falling within the scope of a 'like' product must necessarily be comparable"[351], nor more generally that all export transactions of the product under investigation will necessarily be comparable to the home market sales against which a comparison is to be made. Leaving aside the issue of the meaning of likeness, the fact that Article 2.4 explicitly provides for due allowances to be made for differences that affect price comparability means to us that, in the absence of such adjustments, certain transactions may not be comparable. In other words, the very reason due allowance may be necessary is precisely because the transactions might not otherwise be comparable. This lack of comparability could be due to differences in physical characteristics—a basis for allowance that is specifically identified in Article 2.4—but Article 2.4 tells us that non-comparability could also arise from differences in conditions and terms of sale, levels of trade, quantities and other unspecified differences.[352] Thus, we do not believe that the significance of the reference to "comparable" export prices can simply be discounted on the grounds that the products/transactions must "necessarily be comparable".[353]

7.207 Of course, one way to ensure comparability is to make due allowance for certain differences, but given the inclusion of the term "comparable" in Article 2.4.2 we are not convinced that this method, however important, is the exclusive means allowed by the *AD Agreement* to ensure comparability. Nor, from a practical perspective, do we

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[351] Appellate Body Report, *EC—Bed Linen*, para. 58.

[352] We are also of the view that the authorization in Article 6.10 of the *AD Agreement* to use certain sampling techniques where "the number of (. . .) types of products" is too large, confirms our interpretation that there may be differences in physical characteristics between products being compared, and should dispel those doubts entirely.

[353] Appellate Body Report, *EC—Bed Linen*, para. 58.

believe that such an approach would be desirable. In theory, of course, any difference between products/transactions can be accounted for by adjustments. In many cases, however, it may be difficult to determine whether a difference affects price comparability such that an adjustment is required, much less to establish the amount of the adjustment that would be appropriate. While some differences, such as differences in taxation, may be easy to quantify and adjust for, adjustments for differences in physical characteristics may be complex and highly uncertain, depending upon the number and extent of the differences in physical characteristics, and the extent to which those reflect differences in costs of production. The issue of whether or not DOC should have made due allowance for differences in dimension, addressed elsewhere in this Report, is a demonstration of how complex adjustment questions may be. The quantification of other types of adjustments, such as for differences in level of trade, may be even more problematic. It is therefore not surprising that many investigating authorities—and respondent exporters—prefer to limit to the extent possible the need for such adjustments by performing their comparisons on the basis of groups of transactions sharing common characteristics. Thus, we consider that the use of multiple averaging is consistent with the overall objective of Article 2.4, which is to ensure a fair comparison when comparing export price to normal value.

7.208 We find further support for our view from the fact that Article 2.4.2 allows dumping margins to be calculated on the basis either of weighted-average-to-weighted-average or transaction-to-transaction comparisons. When an investigating authority uses a transaction-to-transaction methodology, it is in a position to select the most similar products/transactions possible for comparison, and may therefore be able to minimize the extent of the adjustments that need to be made. We consider it unlikely that the drafters would have agreed to allow comparisons only at the most aggregated

level (a single weighted-average-to-weighted-average comparison) or the most disaggregated level (transaction-to-transaction) while disallowing the intermediate approach of multiple averaging. Rather, it seems more likely to us that the intention of the drafters in specifying that Members shall normally be restricted to a weighted-average-to-weighted-average or transaction-to-transaction approach was to make clear that a weighted-average-to-transaction approach—a methodology that was widely used before the current *AD Agreement* came into effect—was only permitted in the limited circumstances specified in the second sentence of Article 2.4.2.

7.209 We are, of course, aware that Article 2.4.2 provides for the establishment of the existence of margins of dumping on the basis of *a* comparison of a weighted-average-normal-value with a weighted average of prices of all comparable export transactions, i.e., that the reference to "a" comparison is in the singular rather than in the plural. We note however that the second methodology (transaction-to-transaction) also refers to "*a* comparison of normal value to export prices on a transaction by transaction basis", yet the subsequent reference to export prices makes clear that in such a methodology investigating authorities are not restricted to establishing dumping margins by comparing one single normal value transaction to a single export price, but by definition will, in any case in which there is more than one transaction, be performing multiple comparisons of individual transactions. As for the reference to "*a* weighted average normal value", this use of the singular may be understood to mean that each group of "comparable" export transactions is to be compared to a single weighted-average-normal-value.

7.210 Our analysis of multiple averaging does not rely upon the reference in Article 2.4.2 to the establishment of "margins of dumping". Although it could be argued that this phrase is in the plural precisely because multiple averaging produces a dumping margin for each category of product/transaction

compared, it could just as well be the case that it is in the plural because in many cases there will be multiple exporters or producers. We consider however that, assuming that the reference to "margins of dumping" means the margin of dumping for the product under investigation as a whole[354], our analysis above supports the conclusion that multiple averaging is nevertheless not prohibited by Article 2.4.2. In particular, while it may well be that the reference to "margins of dumping" is a reference to the overall margin for the exports of the product under investigation, this would mean simply that Article 2.4.2 provides guidance with respect to the methodologies used for determining the existence of such margins.[355] It would not, in our view, compel the conclusion that such overall margins could not be derived on the basis of multiple averaging.

7.211 In light of our analysis above, we conclude, and agree with the parties to this dispute, that the use of multiple averaging is not prohibited by the *AD Agreement*.

7.212 Having found that multiple averaging, *per se*, is not prohibited by the *AD Agreement*, we next consider whether the methodology applied by DOC in this case when aggregating the values generated from multiple averaging, in

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[354] As the Appellate Body concluded in para. 53 of its Report in *EC—Bed Linen*.

[355] We note further that Article 2.4.2 requires that the "existence of margins of dumping during the investigation phase shall normally be established *on the basis of* a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. . . ". (emphasis added) We note that the ordinary meaning of the word "basis" is "the underlying support for a process". (*The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 113) This suggests to us that, while the determination of the existence of margins of dumping must be based on weighted average-to-weighted average comparisons, Article 2.4.2 was not intended to spell out in detail all elements of that calculation.

which "negative dumping" was attributed a zero value, is inconsistent with Article 2.4.2.

7.213 Bearing in mind our conclusion in paragraph 7.211, *supra*, regarding multiple averaging, we will now consider the obligations of an investigating authority when calculating a weighted-average-normal-value and a weighted-average-export-price in accordance with Article 2.4.2 of the *AD Agreement* when the product under investigation is divided into sub-categories based on types or models, levels of trade or other differences. The question of zeroing arises in the process of aggregating the weighted averages for the different types or models, levels of trade or other differences, into a single, overall margin of dumping. With regard to this process, parties express diverging views as to whether Article 2.4.2 applies to the determination and comparison of weighted average normal values and weighted average export prices only for each of the types or models (the so-called "first stage")—as the United States argues—or whether it also applies to the aggregation of the results for each of the comparisons made (the so-called "second-stage")—as Canada argues.[356] Thus, the United States asserts that the text "all comparable export transactions" in Article 2.4.2 is—because of the insertion of the word "comparable"—applicable only to the first stage of the calculation process. The United States argues that Article 2.4.2 does not apply to the second stage in the calculation process; thereby not disallowing the use of zeroing by an investigating authority. Canada does not dispute that there are two stages, as asserted by the United States. However, it disagrees with the US argument that Article 2.4.2 does not discipline the second stage.

7.214 In our examination of this question, we keep in mind the Appellate Body's findings with regard to the issue of whether Article 2.4.2 contemplates whether the calculation of

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[356] The two "stages" are described by the United States in its response to question 109 of the Panel, para. 52.

the margin of dumping, as envisaged in Article 2.4.2, can be *divided into two distinct stages*[357], as well as the parties' submissions on this issue. In our view, whether Article 2.4.2 contemplates one or two stages in the calculation of the overall margin of dumping and whether the term "comparable" in "all *comparable* export transactions" relates only to the first stage or to both—in case there were two stages—are related questions. We note that the calculation of the margin of dumping is a process which starts with the determination of the normal value, and it continues with the establishment of the export price. Both prices are subsequently adjusted in order to ensure a "fair comparison", as required by Article 2.4. Finally, these two values—normal value and export price—are compared, for the purpose of computing the overall margin of dumping. Thus, in our view, a determination of the margin of dumping in an anti-dumping investigation could be sub-divided into a whole range of steps or stages, forming a coherent process. At issue are the last two steps in this process of calculating the overall margin of dumping. We do not consider that the question before us is whether there are several steps or stages contemplated in Article 2.4.2 and, if this is the case, whether the obligation imposed by Article 2.4.2 with respect to the calculation of the margin of dumping under the weighted-average-to-weighted-average methodology applies to the first stage only because of the term "comparable" in "all *comparable* export transactions". Rather, we are of the view that the question before us is whether an investigating authority is allowed to partially exclude from the aggregation process those results of comparing types or models for which the weighted-average-normal-value was determined to be less than the weighted-average-export-price in the aggregation process.

7.215 It is clear that Article 2.4.2 requires that all comparable export transactions have to be taken into account

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[357] Appellate Body Report, *EC—Bed Linen*, para. 53.

when the weighted average normal value is compared to the weighted average of prices of *all comparable* export transactions. We note that this interpretation of the requirement of Article 2.4.2 is the same as that of the Appellate Body in *EC—Bed Linen*.[358]

7.216 Through the use of zeroing, it is clear to us that the entirety of the prices of some export transactions, i.e., those export transactions where the weighted-average-export-price is greater than the weighted-average-normal-value, in the second stage of the process, are not taken into account.[359] Recalling our view that the calculation of the margin of dumping is a continuous process, we fail to understand why

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[358] *Id.*, para. 55.

[359] The panel in *EC—Bed Linen* explained how zeroing affects prices of the export transactions to which is applied:

> "[b]y counting as zero the results of comparisons showing a "negative" margin, the European Communities, in effect, changed the prices of the export transactions in those comparisons. It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison. This effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which "negative" margins were found in the comparison, despite the fact that it was, in reality, higher than the weighted average normal value. This is the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value. As a result, we consider that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models is not based on comparisons which fully reflect all comparable export prices, and is therefore calculated inconsistently with the requirements of Article 2.4.2". (Panel Report, *EC – Bed Linen*, para. 6.115)

We agree with the above explanation of how zeroing manipulates the outcome of what should be a determination of dumping which, up to the point of aggregation of the margins of dumping, is consistent with Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, 2.4 and 2.4.1 of the *AD Agreement*.

the negotiators of the *AD Agreement* would have included an obligation in the provisions of the *AD Agreement* (the term "all" in "all comparable export transactions"), if, in the very next step of the calculation process—through zeroing—investigating authorities were to be allowed to ignore this very same obligation (certain values which they were obligated to take into account in the first stage of the process). In other words, we do not interpret the requirement of Article 2.4.2 to bear only on the first stage of the process, but rather view that obligation as applying to the process as a whole. We are of the view that, if the drafters had intended that Article 2.4.2 applies only to the first stage of the process, they would have made this clear. The United States has not advanced any argument explaining why an interpretation that Article 2.4.2 is applicable to the pre-aggregation stage should be accepted by us, apart from the argument that the *AD Agreement* does not contain any requirements as to the second stage of the process. We find this argumentation of the United States not convincing.

7.217 Considering the requirement of Article 2.4.2 that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation, we are of the view that the United States did not take into account all comparable export transactions when DOC calculated the overall margin of dumping in the investigation at issue.

7.218 The United States also argues that:

> "[t]hus, interpreting the language of the first methodology [average-to-average] as requiring authorities to offset dumping margins implies that the negotiators addressed the offset issue with respect to that methodology, but not the other two [transaction-to-transaction and average normal value-to-individual

> transaction export price], leaving the issue to the Members' discretion when utilizing either of the other two methodologies. Canada offers no interpretation of Article 2.4.2 that justifies such an anomalous result, nor does it offer any explanation as to why the negotiators might have intended to create such an anomaly."[360]

7.219 We note that Canada has not raised any claim with regard to DOC's use of "the other two methodologies". Thus, it is not within the Panel's terms of reference to rule on whether zeroing can, or cannot, be used when determining the overall margin of dumping under the other comparison methodologies set forth in Article 2.4.2, i.e., transaction-to-transaction and weighted average normal value-to-individual transaction export price.[361]

7.220 Finally, the United States asserts that the negotiating history of the *AD Agreement* confirms that the calculation of the margin of dumping using zeroing is consistent with Articles 2.4 and 2.4.2. Canada disagrees.

7.221 We note that Article 32 of the *Vienna Convention* provides that:

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[360] US first written submission, paras. 158-159.

[361] Although we are mindful that we are not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies, we are of the view that the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*. As for the use of zeroing when determining a margin of dumping based on the third (weighted average-to-individual) methodology, we note that this methodology is exceptional in nature and can only be used in specific defined situations. Without intending to express any view as to the permissibility of zeroing when this third methodology is used, we do not agree with the United States that it would be an "anomaly" if zeroing were prohibited in the case of average-to-average comparisons but not in the exceptional case of weighted average-to-individual comparisons.

"*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

7.222 We also note that the Appellate Body has consistently found that:

> "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[362]

7.223 As we consider that the meaning imparted by the text of Article 2.4.2 of the *AD Agreement* itself, is neither

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[362] Appellate Body Report, *US—Shrimp*, para. 114. *See* also Appellate Body Report, *US—Carbon Steel*, paras. 61-62, where it is stated that:

> ". . . we recall that Article 3.2 of the DSU recognizes that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules.
>
> . . . the task of interpreting a treaty provision *must begin with its specific terms*". (emphasis added)

equivocal nor inconclusive as to whether zeroing is inconsistent with Article 2.4.2 of the *AD Agreement*, we do not deem it necessary in the case before us to have recourse to the negotiating history in order to confirm the correctness of our reading of the text of that provision.

7.224 We therefore find that the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account all comparable export transactions when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation.

7.225 Canada raises a separate claim of violation of Article 2.4 of the *AD Agreement*. In support of its claim, Canada argues that "[a] "fair comparison" requires equitable, unbiased treatment of all transactions being compared. Zeroing does not produce a fair comparison because it arbitrarily eliminates certain transactions from the calculation, resulting in a margin that does not equally reflect all transactions".[363] The United States disagrees.[364]

7.226 Having found in paragraph 7.224, *supra,* that the methodology applied by DOC when calculating the overall margin of dumping in the investigation on certain softwood lumber products from Canada is inconsistent with Article 2.4.2 of the *AD Agreement,* we consider that it is neither appropriate, nor necessary for us to rule on Canada's Article 2.4 claim.

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[363] Canada response to question 108 (b) of the Panel, paras. 59-61.

[364] US comments on Canada's responses to question 104 of the Panel, para. 7.

IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL REGARDING CANADA'S CLAIM ON ZEROING

9.1 Although I join my colleagues on this Panel with respect to the findings on all other claims before us, I must respectfully disagree with the findings regarding zeroing (Claim 6). In my view, Canada has not established that zeroing is inconsistent either with the specific provisions of Article 2.4.2 or with the general "fair comparison" requirement of Article 2.4. At a minimum, I consider that the United States' interpretation of Articles 2.4.2 and 2.4 as not prohibiting zeroing is a permissible one. Accordingly, I would find that the United States did not act inconsistently with Articles 2.4.2 and 2.4 by reason of the zeroing of negative margins in the investigation underlying this dispute.

9.2 At the outset, I recall the standard of review that governs the work of panels (and the Appellate Body) when examining claims that a Member has violated the *AD Agreement*. Article 17.6(ii) provides that, where a provision of the *AD Agreement* admits of more than one permissible interpretation, a measure shall be found to be in conformity with that provision if it rests upon one of those permissible interpretations. Thus, our task is not to choose our preferred interpretation of Articles 2.4.2 and 2.4 of the *AD Agreement*, but to determine whether the interpretation advanced by the United States is permissible, under the rules of treaty interpretation applicable in WTO dispute settlement. Should we so find, then we must rule that the United States' actions in zeroing in this investigation are in conformity with Articles 2.4.2 and 2.4. In my view, Article 17.6(ii) applies at every step of our analysis: if any essential step in our reasoning depends upon an interpretation which is only one of multiple permissible ones, then we cannot find that the United States has acted inconsistently with the *AD Agreement*.

9.3 Although I disagree with my colleagues' findings on zeroing, I agree with their intermediate conclusion that multiple averaging is permitted by Article 2.4.2 of the *AD Agreement*. In my view, this is not a question of multiple permissible interpretations, but rather of the correct interpretation of that provision. My colleagues have fully explained the bases for their conclusions on multiple averaging, including the need to give meaning to the word "comparable", particularly given its inclusion in the text at a late stage in the negotiations; the appropriateness of reading the phrase "all comparable export transactions" as a whole in a manner which gives meaning to all elements; the relevance of the concept of "price comparability" in respect of Article 2.4 adjustments as context for understanding the term "comparable" in Article 2.4.2; the obvious illogic of interpreting Article 2.4.2 to require that comparisons be made either at the most aggregated (average to average) or least aggregated (individual to individual) level, while prohibiting comparisons at intermediate levels of aggregation[502]; and the consistency of multiple averaging with the overall objective of Article 2.4, which is to ensure a fair comparison. I would only add that the use of the term "margin*s* of dumping", although not conclusive as to whether multiple averaging is allowed, represents an additional element in the overall picture supporting the conclusion that multiple averaging is permitted.

9.4 While I see no need to repeat my colleagues' reasoning, I would like to emphasize the critical importance of multiple averaging in insuring a fair comparison. There will be differences between home market and export transactions in virtually all anti-dumping investigations.

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[502] It is difficult to understand why an investigating authority would be required either to compare the entire product under investigation to the entire foreign like product or individual export transactions to individual home market transaction, while not being allowed to compare groups of export transactions to groups of comparable home market transactions.

These differences may arise from, *inter alia*, physical differences, differences in level of trade, or date of sale.[503] While these differences may in principle be taken into account through adjustments, in many cases it simply will not be possible to identify and quantify their precise effects on price comparability. Further, there are a variety of different ways to get at the issue of price comparability and the making of adjustments. In the case of a wide variety of types or dates of sale, for example, even identifying which of the many groups should represent the standard towards which adjustments should aim will be unclear. Multiple averaging eliminates the need to consider such adjustments, thus reducing the influence of subjective judgment on outcomes. In my view, therefore, multiple averaging not only is not prohibited by the *AD Agreement*, but it is generally the most appropriate, fairest, most precise, most predictable, and in many cases the only possible way to insure a fair comparison.[504] We have to assume that the negotiators were aware of this as they negotiated the *AD Agreement*.

9.5 The reader may ask why it is necessary in this Report to discuss the permissibility of multiple averaging. After all, the parties agree that multiple averaging is permissible under

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[503] For purely practical reasons it can be excluded that the need for multiple averaging in the case of multiple models or types can be eliminated by conducting separate investigations for every model or type, since even a product under investigation which is defined in a seemingly narrow fashion, such as television sets or ball bearings of a specific dimension, may involve innumerable models or types.

[504] At the second meeting of the Panel with the parties, we asked representatives of both parties how often they had come across a case where there was only one step to do, i.e. where there was only one model, one level of trade and one period. The US representative responded that he was unaware of any investigation that fit that description, while the Canadian representative stated that he had experienced "one or two" single-stage cases.

Article 2.4.2[505], and the third parties have not contended otherwise.[506] The reason the discussion is relevant here is that Canada relies upon the Appellate Body ruling on zeroing in *EC—Bed Linen* in this dispute, and in my view that ruling is predicated, at least implicitly, on the conclusion that multiple averaging is prohibited by Article 2.4.2.[507] The Appellate Body's reasoning, which seems ultimately to be based on the view that by zeroing the EC calculated a weighted average that did not fully reflect the prices of some export transactions and thus fell afoul of the requirement to compare a weighted average normal value with a weighted average of all comparable export transactions, simply cannot be squared with a finding that multiple averaging is permitted. Thus, if multiple averaging *is* permitted—and the parties, my colleagues and I all agree that it is—one cannot simply rely upon the Appellate Body Report in *EC—Bed Linen* to conclude that zeroing is prohibited. Rather, we must consider whether there is some *alternative* basis to conclude that zeroing is prohibited by Article 2.4.2.

9.6 My colleagues have attempted to develop such an alternative to the reasoning found in *EC—Bed Linen*. They have concluded that the obligation to include in the weighted

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[505] Canada argued before the Panel that its interpretation of Article 2.4.2 ". . . does not prohibit the establishment of margins of dumping with respect to particular models of a product." Canada response to question 31 from the Panel, para. 109.

[506] Japan noted that "[a] multiple comparison method provided in Article 2.4.2 may be used in the margin calculation process as a matter of administrative convenience to take into account the differences in physical characteristics among several models of a product." (Japan's third party oral statement, para. 5.75, *supra*)

[507] Thus, the Appellate Body stated that "[a]ll types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2." (Appellate Body Report, *EC—Bed Linen*, para. 58)

average export price "all comparable export transactions" applies not only to the comparison stage but *also* to the aggregation of the results of multiple comparisons. They consider that through zeroing the United States partially excluded from the aggregation process the results of comparisons for types for which the weighted average normal value was less than the weighted average export price. They conclude that the United States therefore violated Article 2.4.2 by not taking into account all comparable export prices when calculating the overall margin of dumping. I must respectfully disagree.

9.7 It will be recalled that, when an investigating authority engages in multiple averaging, it first divides the subject merchandise (and the foreign like product) into groups based upon common characteristics (which may relate to physical characteristics, level of trade, date of sale, etc). It calculates a weighted average normal value and export price for each group, and then compares the weighted averages in order to determine the extent of the dumping, if any, for that group. The result will be multiple margins of dumping (or amounts of dumping, if one prefers), one for each group. In order to determine an overall margin for the product under investigation, however, it will be necessary in some way to aggregate the results from the comparisons for each group. An analogous process will be involved where an investigating authority performs its calculations on a transaction-to-transaction basis. In that case as well, the investigating authority will derive margins (or amounts) of dumping for a number of specific transactions, and will then have to aggregate those margins in order to determine an overall margin of dumping for the product.

9.8 There is no doubt that, as the investigating authority in the case of multiple averaging is calculating weight-averaged normal values and export prices for each group, it is required in the investigation phase to respect Article 2.4.2. This includes the obligation under Article 2.4.2 to include in each

of the average-to-average comparisons "all comparable export transactions". In this case, however, there is no suggestion that DOC has failed to include any comparable export transactions in any of the average to average comparisons DOC made in this case. Nor is there any indication that DOC failed to *fully* take into account any export transaction in the conduct of each average to average comparison. Based on the record before us, it must be considered that each and every one of the export transactions considered by DOC was fully taken into account when performing the comparison between normal value and export price for a given type. Rather, the claim of Canada, and the reasoning of my colleagues on this Panel, is based upon the view that the United States breached the obligation to include "all comparable export transactions" as a result of the manner in which the United States aggregated the results of its multiple comparisons.

9.9 It seems to me that my colleagues are trying to reconcile two mutually incompatible positions. They conclude that Article 2.4.2 does not require that the overall margin of dumping for a product be calculated on the basis of a single weighted average export price and single weighted average normal value. At the same time, they seem to conclude that the ultimate result of the aggregation of multiple average to average comparisons must be the same as if DOC had conducted a single average to average comparison, or in any event that once it has performed multiple averages DOC is required to average those averages, using negative dumping margins to offset positive margins. In my view, these conclusions are unconvincing. Article 2.4.2 allows multiple averaging, and the obligations of Article 2.4.2 relate to each of the average to average comparisons performed. This is all the guidance that can be determined from the text of Article 2.4.2. I can see nothing in Article 2.4.2 that specifically dictates how those "intermediate" margins are to be aggregated in order to calculate an overall margin of dumping for the investigated product for a given

exporter, any more than I can see anything in Article 2.4.2 that prescribes how the results of transaction-by-transaction comparisons are aggregated.

9.10 In this respect, it is noteworthy that the *AD Agreement* is silent as to aggregation not only with respect to the first (average-to-average) comparison methodology. I note as a matter of relevant context that Article 2.4.2 is equally silent as to how to aggregate the results of transaction-by-transaction comparisons under the second methodology set forth in that provision. Article 2.4.2 provides that the existence of margins of dumping may be established "by a comparison of normal value and export prices on a transaction by transaction basis". Clearly, nothing in Article 2.4.2 gives specific guidance on how the results of individual transaction comparisons are to be aggregated, and the textual basis relied on by my colleagues for prohibiting zeroing when aggregating the results of multiple average-to-average comparisons ("all comparable export transactions") on its face does not apply to the transaction-by-transaction methodology. It is therefore clear that Article 2.4.2 does not prohibit zeroing in the context of the transaction-by-transaction methodology.[508] It would be very odd indeed for the drafters to have prohibited zeroing when aggregating the results of multiple average to average comparisons, while allowing it to be used when aggregating the results of comparisons performed on a transaction by transaction basis.[509]

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[508] Nor, for the reasons set forth in paras. 9.14 to 9.24 *infra*, would zeroing be prohibited under a general "fair comparison" requirement under Article 2.4.

[509] My colleagues decline to address the issue of zeroing in the context of individual to individual transactions on the grounds that it is not within the Panel's terms of reference. While it is certainly true that no such claim is before us, I believe that the language in Article 2.4.2 regarding transaction to transaction comparisons is highly relevant context for interpreting other parts of Article 2.4.2.

9.11 The use of multiple averaging must have been widely known to negotiators, as the practice was the norm under the *Tokyo Round Anti-Dumping Code*. The negotiators should also have been fully aware of the zeroing issue.[510] They certainly should have realized that simply requiring average-to-average or transaction-by-transaction comparisons would not resolve the issue of aggregation in the subsequent stage. But if the drafters did not intend to prohibit zeroing, then what is the purpose of Article 2.4.2? In my view, Article 2.4.2 was intended to address a related but distinct issue from that of zeroing, i.e., the question of average to individual comparisons. Prior to the Uruguay Round, many investigating authorities compared individual export transactions to an average normal value. On its face, the purpose of Article 2.4.2 seems to be to require that, except in specified situations, there be symmetry in the comparisons made by investigating authorities, i.e., that Members *either* compare on an average to average *or* a transaction to transaction basis. Only where particular conditions are met may a Member perform a comparison of prices of individual export transactions to an average normal value.

9.12 I recall that, under Article 17.6(ii) of the *AD Agreement*, a panel may not find a measure to be inconsistent with a provision of the *AD Agreement* if that measure is based on a permissible interpretation of that provision. In this case, I consider that the US interpretation of Article 2.4.2 as not prohibiting zeroing is a permissible one. Thus, for the reasons set forth above, I would find that the application by DOC of

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[510] In fact, the EC and Japan were involved in a high-profile dispute with respect to zeroing throughout the later stages of the anti-dumping negotiations, beginning with a request for consultations on 8 July 1991 and culminating in the circulation of a Panel Report in *EC—Audio Cassettes*. (Panel Report, *EC—Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, 28 April 1995, ADP/136.) This Report was never adopted.

"zeroing" in this case was not inconsistent with Article 2.4.2 of the *AD Agreement*.

9.13 Some may be troubled by the prospect that no specific rules exist regarding the manner in which the results of multiple average to average (and transaction-by-transaction) comparisons may be aggregated. The general provision of Article 2.4 is however still available, as discussed infra. In any event, the establishment of an anti-dumping margin is a highly complex exercise. Although Article 2 of the current *AD Agreement* is more detailed that its Tokyo Round predecessor, many aspects of margin calculation are not specifically addressed. If Members consider that the issue of how to aggregate the results of multiple comparisons is a lacuna that needs to be filled, then they should negotiate such rules in the appropriate forum. Dispute settlement involves the interpretation of rules agreed by Members. It cannot and must not be used as a substitute for rule-making through negotiation.

9.14 Canada also claims that the United States has violated the "fair comparison" requirement of Article 2.4 of the *AD Agreement* by the application of zeroing in this case, because zeroing unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value than to those for which the export price is greater than the normal value. Canada finds support for its position in a statement by the Appellate Body in *EC—Bed Linen*.[511] Having found that zeroing was inconsistent with Article 2.4.2, my colleagues exercised judicial economy and declined to rule on this claim. In light of my view that Article 2.4.2 does not prohibit

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[511] "We are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and 2.4.2." (Appellate Body Report, *EC—Bed Linen*, para.55)

zeroing, however, it is appropriate for me to proceed to a consideration of this alternative claim by Canada.

9.15 I recall that Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal value." There has not to date been any substantial analysis in WTO dispute settlement as to the precise legal role of this language, including whether it establishes an independent legal obligation or rather serves only to inform interpretation of other operative provisions of Article 2. Much less has there been any significant consideration of the manner in which it is to be interpreted and applied.[512] Nor did the parties provide significant argumentation on this issue. That said, the first sentence of Article 2.4 appears to be drafted in a manner which implies that it is independently operational and legally binding[513], and I will thus proceed on that assumption for the purposes of my consideration of this claim.

9.16 In terms of approach, I believe that a claim based on a highly general test such as "fair comparison" should be approached with caution by treaty interpreters. The concept of fairness in the abstract is highly subjective, and a too-ready reliance on the "fair comparison" requirement could result in interpretations that were highly unpredictable. Further, I am not inclined to accept that the drafters intended that the Members abdicate their responsibility to negotiate rules in this area and leave the rule-making function in the hands of

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[512] The Appellate Body has stated that "Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'." (Appellate Body Report, *EC—Bed Linen*, para.59)

[513] As compared with the drafting of its predecessor provision in the *Tokyo Round AD Code*, Article 2.6, which provided that "[i]n order to affect a fair comparison . . . the two prices shall be compared at the same level of trade . . . .".

the dispute settlement system. Taking this into account, I approach Article 2.4's "fair comparison" requirement with two elements in mind. First, any conception of "fairness" (and "unfairness") should be solidly rooted in the context provided by the *AD Agreement* (and perhaps the *WTO Agreement* more generally). Second, given the subjectivity of the concept of fairness, the principles of Article 17.6(ii) of the *AD Agreement* regarding permissible interpretations are particularly relevant.

9.17 Canada has made only general statements regarding why the application of the zeroing methodology by DOC in this case failed to produce a "fair comparison". In response to a question from the Panel on this issue, Canada responded that a comparison conducted on the basis of zeroing cannot be considered to produce a "fair comparison" within the meaning of Article 2.4, because it unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value, than to those for which the export price is greater than the normal value.[514] In response to another question to Canada regarding the benchmark against which Canada would test whether a comparison is fair or unfair[515], Canada responded in general terms and did not explain how it applied its "benchmark" to this case.

9.18 In my view, Canada's explanation amounts to little more than an assertion that because zeroing (when combined with multiple averaging) may result in a margin of dumping which is higher than that which would have resulted from comparing a single weighted average export price to a single weighted average normal value, it does not produce a fair comparison. If Article 2.4.2 required that a margin of dumping be based on a single average to average comparison, then Canada's assertion that greater weight was given to some

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[514] Canada response to question 108(a) of the Panel.

[515] Question 108(b) by the Panel.

transactions than to others might be correct (if superfluous). It has however been established that multiple averaging is not prohibited by Article 2.4.2 (as of course neither is a transaction-by-transaction methodology). I further note that Canada does not contend that DOC gave greater weight to certain export transactions than to others in its performance of each average-to-average comparison. Nor did DOC fail to take into account any export transactions, as the overall amount of dumping found was divided over the full amount of all export transactions in order to calculate a margin of dumping. Rather, Canada is simply arguing that it is unfair not to provide credit for negative dumping margins, apparently purely because this results in a higher dumping margin than would be the case if such credit were given.

9.19 I note that the differing views of the parties regarding interpretation of Article 2.4 appear to reflect an underlying difference regarding the concept of "dumping". One school of thought is that "dumping" relates to the average pricing behaviour of an exporter/producer over time. For those who hold this view, the fact that a particular export transaction is made at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost) does not necessarily mean that dumping has occurred, if another export transaction is made at a price which is higher than the home market price. They believe that exporters should be given "credit" for selling above normal value, and consider zeroing to be illogical. Others consider that any time a particular export transaction occurs at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost), dumping has occurred. From this perspective, overall margins of dumping are calculated simply because it is impractical to calculate and impose anti-dumping duties with respect to each export transaction, and the idea that such a transaction should not be viewed as dumped merely because

another export transaction occurs at a higher price makes no sense.

9.20 The difference between these two approaches can be understood on the basis of a simple example. Assume there are two home market sales and two export sales of a product during the period of investigation. Both home market sales are made at a price of 100. One of the export sales is made at a price of 50, the other at a price of 150. Under one school of thought, what is relevant is average pricing behaviour. Since the average normal value and average export price are both 100, there is no dumping and no duties should be imposed. Under the second school of thought, one of the two sales was at a dumped price while the other was not. Duties should therefore be collected on the dumped sale. However, a dumping margin should be calculated that would reflect that only some sales were dumped. Using zeroing, the total amount of dumping (50) would be divided by total export sales (200), resulting in a 25 per cent margin. Imposition of a 25 per cent duty on the two export transactions would result in the collection of duties in the amount of 50, the same amount of duties as would have been collected had dumping been determined and duties assessed for each transaction.[516]

9.21 Arguments may be advanced for each of the conceptual approaches identified above. For the "average pricing behaviour" advocates, it is simply not consistent with commercial reality to expect that exporters will be able to fine-tune their pricing on a transaction by transaction basis to avoid dumping. Advocates of the alternative approach argue that the harm caused to domestic producers by a dumped transaction—e.g., the loss of a sale or sale at a lower price than would have otherwise occurred—is not undone simply because another export transaction is made at greater than normal value, nor is the damage caused by dumping of a

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[516] *See EC—Audio Cassettes* (unadopted) for an analysis of the "fair comparison" requirement which reflects this analytical approach.

particular type or model undone simply because another model is sold at greater than normal value. Both approaches have strengths and weaknesses.

9.22 My task is not of course to decide which conceptual approach *I* prefer, but to examine whether the *AD Agreement* shows such a preference. The Agreement does not contain any preamble or statement of object and purpose[517], and in my view there is no basis to conclude that the Agreement is premised on the "average pricing behaviour" approach. In fact, an early GATT Group of Experts Report on antidumping noted that "the ideal method . . . was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned . . .", and this could be taken to suggest the contrary.[518] The fact that the *AD Agreement* permits the use of variable duties as a basis for duty collection is a further basis to conclude that, at a

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[517] Article VI of *GATT 1994* does however state that "dumping . . . is to be condemned if it causes or threatens material injury . . . ."

[518] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts adopted by the CONTRACTING PARTIES on 27 May 1960, BISD 9th Supp. p. 194. It is clear that under the "ideal method" identified in the Report non-dumped transactions would neither be subject to anti-dumping duties nor used to offset dumped transactions. In their Report, the Group of Experts however concluded that such a method was "clearly impracticable", in particular as regards injury, and for this reason a pre-selection system—i.e. a system where the margin of dumping for future imports is established, at least provisionally, on the basis of a prior period—seemed to be the most satisfactory. This "pre-selection" approach is the basis for virtually all anti-dumping systems today. The application of an *ad valorem* duty for a product, calculated based on the transaction-by-transaction methodology comparison method in paragraph 2.4.2 combined with the aggregation of the results of the individual comparisons using zeroing, is mathematically equivalent and would result in the collection of anti-dumping duties on the product as a whole in the same amount as if the "ideal method" had been applied. Zeroing when aggregating the results of multiple comparisons under a multiple averaging approach would of course generally result in collection of a *lower* amount of total duties than the "ideal method".

minimum, the *AD Agreement* is not premised exclusively on an "average pricing behaviour" approach.[519, 520] Thus, I fail to see how it may be concluded, based upon the *AD Agreement* itself, that a calculation methodology that does not reflect the "average pricing behaviour" approach is unfair in the sense of Article 2.4.

9.23 I am aware that the Appellate Body in *EC—Bed Linen* expressed the view that zeroing is inconsistent with the "fair comparison" requirement in Article 2.4. I note however that this statement is *obiter dictum*, as Article 2.4 was not part of a claim before the Appellate Body. More importantly, I note that the Appellate Body did not set out any of its reasoning underlying this statement. I do not consider that I would be acting in a manner consistent with my obligations under Article 11 of the *DSU* to perform a "objective assessment of the matter" if I were simply to find in favour of Canada on the basis of such an unsupported statement.

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[519] Under a "variable duty" approach to duty collection, a Member that has established in an investigation that injurious dumping exists does not impose an *ad valorem* or specific duty, but rather imposes duties *on a transaction by transaction basis* where the export price is below the normal value determined during the investigation. Under such a system, the fact that one transaction occurs at a price in excess of normal value does not excuse the exporter from paying duties on another transaction that occurs at a price that is less than normal value. This approach which is referred to in Article 9.4(ii) of the *AD Agreement* as a "prospective normal value", has recently been found to be consistent with the *AD Agreement*. *See* Panel Report, *Argentina—Poultry*, paras. 7.345-7.367.

[520] It is also interesting to note that, when under Article 9.4 an investigating authority is called upon to determine a rate for un-investigated exporters, it is not required to give credit for any "negative dumping" by investigated exporters. Thus, the *AD Agreement* does not in this context even consider the possibility that negative margins should be taken into account when aggregating the results of dumping calculations for selected exporters or producers in order to establish a margin of dumping for un-investigated exporters or producers.

9.24 For the foregoing reasons, and taking into account the standard of review under Article 17.6(ii), I would conclude that Canada has not established that the application of zeroing in the underlying investigation methodology was inconsistent with the United States' obligation under Article 2.4 to conduct a "fair comparison."

APPENDIX G

WORLD TRADE ORGANIZATION

WT/DS244/AB/R
15 December 2003
(03-6603)

Original: English

UNITED STATES—SUNSET REVIEW OF ANTI-DUMPING DUTIES ON CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM JAPAN

AB-2003-5

Report of the Appellate Body

* * * *

VI. Japan's Specific Claims under Article 11.3 of the *Anti-Dumping Agreement*

* * * *

C. *The Dumping Margins Used in the CRS Sunset Review*

1. *Japan's Appeal*

118. Before the Panel, Japan challenged USDOC's reliance in the CRS sunset review[129] on the dumping margins calculated in the two previous administrative reviews. The Panel noted that Japan did not challenge the duties collected pursuant to the administrative reviews or contend that the use, in sunset reviews, of margins calculated in administrative reviews is *per se* inconsistent with the *Anti-Dumping Agreement*.[130] Rather, Japan argued only that USDOC could not, in the CRS sunset review, rely on the margins in question because they had been calculated using a "zeroing" methodology[131] that the Appellate Body has found to be inconsistent with Article 2.4.[132]

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[129] As explained above, Japan's appeal on this issue is limited to the CRS sunset review and does not extend to the Sunset Policy Bulletin "as such". *Supra*, para. 70.

[130] Panel Report, para. 7.157.

[131] Before the Panel, Japan stated that "USDOC has a standard practice of using the zeroing methodology to eliminate all negative dumping margins." Japan also stated that "USDOC calculated NSC's dumping margin in . . . [the] administrative reviews by zeroing the negative margins." (Japan's first submission to the Panel, paras. 181-182)

[132] Japan's first submission to the Panel, para. 176, referring to Appellate Body Report, *EC—Bed Linen*. The Final Results of the CRS sunset review were published on 2 August 2000. The Appellate Body Report in *EC—Bed Linen*, in which we found a zeroing methodology of the European Communities to be inconsistent with the *Anti-Dumping*

119. The Panel construed Japan's claim as "predicated on an inconsistency with Article 2.4" of the *Anti-Dumping Agreement*.[133] The Panel found that, in the CRS sunset review, the United States did not act inconsistently with that provision by relying on the dumping margins in question[134] because "the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of* dumping [do not] apply in making a *determination of likelihood of continuation or recurrence of* dumping under Article 11.3."[135] The Panel also examined, in the alternative, whether the United States acted inconsistently with Article 11.3 in the CRS sunset review.[136] The Panel stated that:

> . . . it would not have been unreasonable for the DOC, in the particular circumstances of this case, to have considered that these administrative review dumping margins could properly be taken into account in considering whether likelihood of continuation or recurrence of "dumping" existed.[137]

120. The Panel therefore found, in the alternative, that the United States did not act inconsistently with Article 11.3.[138]

121. On appeal, Japan argues that the Panel erred in interpreting the obligations of the United States under Articles 2.4 and 11.3 of the *Anti-Dumping Agreement*. Accordingly,

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Agreement, was subsequently circulated to WTO Members on 1 March 2001 and adopted on 12 March 2001. See *infra*, para. 134.

[133] Panel Report, para. 7.171.

[134] *Ibid.*, para. 7.170. See also para. 8.1(d)(iii).

[135] *Ibid.*, para. 7.168. (original emphasis)

[136] *Ibid.*, para. 7.172. The Panel considered that this "alternative" analysis would be constructive "in the event that we have construed Japan's claims and arguments . . . in an overly restrictive manner". (Panel Report, para. 7.172)

[137] *Ibid.*, para. 7.183.

[138] *Ibid.*, para. 7.184. See also para. 8.1(d)(iii).

Japan asks us to reverse the above findings of the Panel and to find that, in the CRS sunset review, the United States acted inconsistently with Article 2.4 in conjunction with Article 2.1 and, therefore, with Article 11.3 of the *Anti-Dumping Agreement* by relying on dumping margins calculated in previous administrative reviews using a "zeroing" methodology.[139] Like the Panel[140], we stress that Japan challenges USDOC's use of these margins only in the CRS *sunset review*. Japan does not contend, in this proceeding, that the calculation of dumping margins in the *administrative reviews*, or the collection of duties on the basis of those margins, was inconsistent with the *Anti-Dumping Agreement*.

122. In addressing this issue, we first consider the reasons for the Panel's findings regarding Articles 2.4 and 11.3 of the *Anti-Dumping Agreement*, keeping in mind the specific context of the CRS sunset review. We then assess whether, in the circumstances of the CRS sunset review, USDOC acted inconsistently with Article 2.4 or Article 11.3 by relying on dumping margins calculated in previous administrative reviews allegedly using a zeroing methodology.

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3. *Completing the Analysis*

133. We now consider whether we can complete the analysis and rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 in the CRS sunset review in relation to this issue. Japan argues that the United States acted inconsistently with these provisions by relying on the dumping margins from the administrative reviews because these margins had been calculated using a

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[139] Japan states that, in calculating these margins, "DOC zeroed—literally, DOC ignored—negative margins." (Japan's appellant's submission, para. 39)

[140] *Supra*, para. 118.

zeroing methodology.[157] We begin by recalling our findings in *EC—Bed Linen*, and then we examine the implications of those findings for the present appeal.

134. In *EC—Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using a "zeroing" methodology[158] in the anti-dumping investigation at issue in that case.[159] We held that the European Communities' use of this methodology "inflated the result from the calculation of the margin of dumping."[160] We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a "fair comparison" between export price and normal value as required by Articles 2.4 and 2.4.2.[161]

135. When investigating authorities use a zeroing methodology such as that examined in *EC—Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing . . . may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing."[162] Thus, the inherent

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[157] Japan states that, in calculating these margins, "DOC zeroed—literally, DOC ignored—negative margins." (Japan's appellant's submission, para. 39)

[158] The methodology used by the European Communities is described in paragraph 47 of our Report in *EC—Bed Linen*.

[159] Appellate Body Report, *EC—Bed Linen*, para. 66.

[160] *Ibid.*, para. 55.

[161] *Ibid.*

[162] Panel Report, para. 7.159.

bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.

136. In evaluating whether the United States acted inconsistently with the *Anti-Dumping Agreement* in the CRS sunset review by relying on the dumping margins from the administrative reviews, we note that the United States seemed to accept that USDOC's methodology in the administrative reviews was "a methodology in which no offset is granted to the respondent for negative differences between the normal value and export price (or constructed export price) of individual transactions".[163] It appears, therefore, that there was some similarity between the methodology used by USDOC in the administrative reviews and the methodology used by the European Communities and examined in *EC—Bed Linen*. However, the United States does not accept Japan's characterization of USDOC's methodology as "zeroing".[164] The United States also maintains that our Report in *EC—Bed Linen* is not relevant to USDOC's methodology because, *inter alia*, USDOC calculated dumping margins on an "average-to-transaction" basis, whereas the European Communities calculated dumping margins on an "average-to-average" basis.[165]

137. Turning to the Panel's description of the methodology used by USDOC in the administrative reviews, we note that the Panel merely stated that USDOC "applied a weighted

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[163] United States' first submission to the Panel, para. 125. In addition, the United States stated before the Panel that, under USDOC's methodology, "no dumping duty—positive or negative—was computed for US sales made at non-dumped prices." (United States' response to Question 27 posed by the Panel, para. 62; Panel Report, p. E-66)

[164] United States' first submission to the Panel, para. 144 (referring to USDOC's use of "allegedly 'zeroed' dumping margins").

[165] United States' appellee's submission, footnote 56 to para. 40, as clarified by the United States at the oral hearing.

average-to-transaction methodology in establishing the dumping margins in administrative reviews."[166] This does not appear to be in dispute. However, the details of the alleged "zeroing" in the methodology used by USDOC in the administrative reviews are less clear. The Panel Report contains no other factual findings about the particular methodology used by USDOC in the administrative reviews, nor any clear indication of whether the Panel considered that this methodology entailed "zeroing" of some kind. In these circumstances, and in the absence of uncontested facts on the Panel record, it is not possible for us to assess whether the methodology that USDOC used in calculating the dumping margins in the administrative reviews was equivalent in effect to the methodology used by the European Communities and considered by us in *EC—Bed Linen*.

138. Given the lack of factual findings by the Panel regarding the methodology used by USDOC in the administrative reviews, we do not have a sufficient factual basis to complete the analysis of Japan's claim on this issue. For these reasons, we find that we are unable to rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying on the dumping margins from the administrative reviews in making its likelihood determination in the CRS sunset review.

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[166] Panel Report, para. 7.158.

APPENDIX H

WORLD TRADE ORGANIZATION

WT/DS141/AB/R
1 March 2001
(01-0973)

Original: English

EUROPEAN COMMUNITIES—ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA

AB-2000-13

Report of the Appellate Body

* * * *

IV. Article 2.4.2 of the *Anti-Dumping Agreement*

46. The first issue raised in this appeal is whether the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

47. The practice of "zeroing", as applied in this dispute, can briefly be described as follows[16]: first, the European Communities identified with respect to the product under investigation—cotton-type bed linen—a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive* dumping margin" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a "*negative* dumping margin" for each model.[17] Thus, there is a "positive dumping margin" where there *is* dumping, and a "negative dumping margin" where there *is not*. The "positives" and "negatives" of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the

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[16] For a more detailed description, see Panel Report, para. 6.102.

[17] For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value*.

amounts it had calculated as "dumping margins" for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any "negative dumping margin" as zero—hence the use of the word "zeroing". Then, finally, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

48. With respect to this first issue appealed, the Panel found that:

> . . . the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.[18]

49. The European Communities appeals this finding. In defending its practice of "zeroing", the European Communities principally argues that the Panel was mistaken about the ordinary meaning of Article 2.4.2. According to the European Communities, Article 2.4.2 requires a comparison with a "weighted average of prices of all *comparable* export transactions" (emphasis added), which, in the view of the European Communities, as we understand it, is not the same as requiring a comparison with a weighted average of *all* export transactions. Emphasizing the presence in Article 2.4.2 of the word "comparable", the European Communities maintains that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of

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[18] Panel Report, para. 6.119.

dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. Thus, the European Communities sees two stages in calculating margins of dumping in such an anti-dumping investigation, and contends that Article 2.4.2 provides *no guidance* as to how the "margins of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under investigation. On this reasoning, the European Communities asserts that, as "zeroing" takes place during this second stage of the domestic anti-dumping process, "zeroing" cannot be inconsistent with Article 2.4.2. Accordingly, the European Communities concludes that the Panel failed to give proper meaning to the word "comparable" as well as to the comparability requirement in Article 2.4.2[19], erroneously applied Article 2.4.2 to the calculation of the overall margin of dumping for the product under investigation[20], and erred in its overall analysis of this issue on the premise that dumping margins can be established only for a *product*.[21]

50. As always, we turn first to the text of the provision at issue on appeal. Article 2.4.2 of the *Anti-Dumping Agreement* states:

> Subject to the provisions governing fair comparison in paragraph 4, the *existence of margins of dumping* during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of

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[19] European Communities' appellant's submission, paras. 14-20 and 38-41.

[20] European Communities' appellant's submission, paras. 21-30.

[21] European Communities' appellant's submission, paras. 31-37.

> normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

51. Article 2.4.2 of the *Anti-Dumping Agreement* explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there *is* dumping. Toward this end, Article 2.1 states:

> For the purpose of this Agreement, a *product is to be considered as being dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

From the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.

52. We observe that, in this case, the European Communities defined the *product* at issue in its anti-dumping investigation as follows:

> The *proceeding covers bed linen of cotton–type fibres*, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.

. . .

> Notwithstanding the *different possible product types* due to different weaving construction, finish of the fabric, presentation and size, packing, etc., *all of them constitute a single product for the purpose of this proceeding* because they have the same physical characteristics and essentially the same use.[22] (emphasis added)

53. Thus, of its own accord, the European Communities clearly identified cotton-type bed linen as the *product* under investigation in this case. This is undisputed in this appeal. Having defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish "the existence of margins of dumping" for the *product*—cotton-type bed linen—and not for the various types or models of that product. We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of "the existence of margins of dumping" for *types or models* of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these "two stages". Whatever the method used to calculate the margins of dumping, in our view, these margins must be,

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[22] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation.

54. With this in mind, we recall that Article 2.4.2, first sentence, provides that "the existence of margins of dumping" for the product under investigation shall normally be established according to one of two methods. At issue in this case is the first method set out in that provision, under which "the existence of margins of dumping" must be established:

> . . . on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . .

55. Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value."[23] By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn,

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[23] Panel Report, para. 6.115.

inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions—that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" at issue in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

56. We are mindful that Article 2.4.2 provides for "a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions". (emphasis added) In our view, the word "comparable" in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of "a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions". (emphasis added)

57. The ordinary meaning of the word "comparable" is "able to be compared".[24] "Comparable export transactions" within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. The European Communities argues before us that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various models or

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[24] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 269.

types of bed linen involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".[25] However, as we have already noted, at the very outset of its anti-dumping investigation, the European Communities identified, of its own accord, cotton-type bed linen as the *product* under investigation. Moreover, in defining cotton-type bed linen as the product at issue, the European Communities stated that "the *different* possible *product types . . . constitute a single product* for the purpose of this proceeding because *they have the same physical characteristics* and *essentially the same use*".[26] (emphasis added) Furthermore, we observe that, in the context of defining the product at issue, the European Communities also made the following determination relating to the identity of the "like product" on the Community market subject to its investigation:

> The Commission examined whether cotton-type bed linen produced by the Community industry and sold on the Community market, as well as cotton-type bed linen produced in Egypt, India and Pakistan and sold on the Community market and on their domestic markets were alike.
>
> . . .
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> The Commission concluded that although there were differences in the mix of products produced in the Community and that sold for export to the Community or sold domestically in the countries concerned, *there were no differences in the basic characteristics and uses of the different types and qualities of bed linen of cotton-*

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[25] European Communities' appellant's submission, para. 39. See also para. 40 and footnote 34 of the European Communities' appellant's submission.

[26] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10.

> *type fibres*. Therefore domestic and export types in the countries concerned and types produced in the Community were considered *like products* within the meaning of Article 1(4) of Regulation (EC) No 384/96 . . .[27] (emphasis added)

58. Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.

59. This interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 of the *Anti-Dumping Agreement* states in relevant part:

> A *fair comparison* shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance* shall be made in each case, on its merits, *for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. (emphasis added)

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[27] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, paras. 11 and 14. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for "differences in . . . physical characteristics".

60. We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability". Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.[28]

61. In support of its appeal of the Panel's interpretation of Article 2.4.2, the European Communities argues, additionally, that this interpretation would not allow Members to counter

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[28] See *supra*, paras. 57-58.

dumping "targeted" to certain types of the product under investigation.[29] With respect to the notion of "targeted" dumping, we note that Article 2.4.2, second sentence, states:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find *a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

62. This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.[30]

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[29] European Communities' appellant's submission, paras. 46-49.

[30] The European Communities also argues in its appellant's submission, paras. 42-45, that the Panel's interpretation of Article 2.4.2 would

63. Finally, the European Communities argues that the Panel did not establish that the interpretation of Article 2.4.2 by the European Communities was "impermissible" and that, therefore, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*.[31] On this, we observe that Article 17.6(ii) states:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

64. In this case, the Panel explicitly recognized that it was to interpret the *Anti-Dumping Agreement* in accordance with the customary rules of interpretation of public international law as set out in the *Vienna Convention*.[32] Having interpreted Article 2.4.2 accordingly, the Panel found:

> . . . that the European Communities acted *inconsistently* with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price

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disadvantage those importing Members which collect anti-dumping duties on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

[31] European Communities' appellant's submission, paras. 50-58.

[32] Panel Report, para. 6.46.

differences calculated for some models of bed linen.[33] (emphasis added)

65. It appears clear to us from the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the *Anti-Dumping Agreement* as a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Thus, the Panel was not faced with a choice among multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to borrow a word from the European Communities, "impermissible". We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.

66. For all these reasons, we uphold the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

* * * *

[33] Panel Report, para. 6.119.

APPENDIX I

A-588-054
A-588-604
ARP: 1998-99
IA/Group III: DS/PT
Public Document

MEMORANDUM TO: Bernard T. Carreau, fulfilling the duties of
Assistant Secretary for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
AD/CVD Enforcement Group III

SUBJECT: Issues and Decision Memorandum for the 1998-1999 Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan (A-588-604/A-588-054); Final Results of Antidumping Duty Administrative Reviews

Summary

We have analyzed the comments and rebuttals of interested parties in the 1998-1999 administrative reviews of the antidumping duty order on tapered roller bearings (TRBs) and parts thereof, finished and unfinished, from Japan (A-588-604), and the antidumping finding on TRBs, four inches or less in outside diameter, and components thereof, from Japan (A-588-054). As a result of our analysis, we have made changes, including corrections of certain programming and

ministerial errors, in the margin calculations. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in these administrative reviews on which we received comments and rebuttals by parties:

1. Facts Available/Further Manufacturing
2. Adjustments to Normal Value
3. Adjustments to United States Price
4. Cost of Production and Constructed Value
5. Level of Trade
6. Arm's-length Test
7. Sales Outside the Ordinary Course of Trade
8. Model Match
9. Margin Calculations/Assessment Rates
10. Ministerial Errors

Background

On November 7, 2000, we published in the *Federal Register* the preliminary results of the 1998-99 administrative reviews of the antidumping duty order and finding on TRBs from Japan. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 FR 66711 (*Preliminary Results*).

The period of review (POR) is October 1, 1998, through September 30, 1999. The review of the A-588-054 case covers TRB sales by two manufacturers/exporters, Koyo Seiko Co., Ltd. (Koyo) and NSK Ltd. (NSK). The review of the A-588-604 case covers TRB sales by three manufacturers/ exporters (Koyo, NSK, and NTN Corporation (NTN)). We invited parties to comment on our preliminary results of review. We received case briefs from Koyo, NSK, NTN and the petitioner, The Timken Co. (Timken), on December 7,

2000. We received rebuttal briefs from each of the same parties on December 19, 2000. At the request of certain interested parties, we held a public hearing on January 24, 2001.

Discussion of the Issues

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9. Margin Calculations/Assessment Rates

Comment 1. Setting Negative Margins to Zero

NSK states that in the instant review, the Department treated U.S. sales with negative margins (sales made at or above home market prices) as having a zero percent dumping margin, a practice known as "zeroing." NSK cites *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, ¶ 6.119 (October 30, 2000) (*EC—Bed Linen*), in which a World Trade Organization (WTO) dispute settlement panel determined that the European Community violated Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) by zeroing negative price differences when calculating dumping margins. Since the Department has followed a similar methodology in this review by not offsetting positive margins with negative margins, NSK argues, the Department has violated both the Antidumping Agreement and U.S. antidumping law.

Referring to the SAA at 149-150, NSK asserts that the Department's use of zeroing violates the URAA, which amended U.S. antidumping law in order to implement Article 2 of the Antidumping Agreement. NSK then cites *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (*Federal-Mogul*), in which the Federal Circuit stated that "GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international

obligations." NSK points to the WTO Panel's finding that the requirements of Article 2.4.2 of the Antidumping Agreement must apply to the entire process of calculating dumping margins, and "that there is no 'subsequent stage' which escapes entirely from the strictures of Article 2.4.2." NSK Case Brief at 7, quoting WTO Panel report for *EC—Bed Linen* at ¶ 6.116. NSK contends that although *EC—Bed Linen* "involved a comparison of weighted averages for export prices and normal values, its ruling applies to all dumping methodologies, including the Department's comparison in this review of weighted-average normal values to transaction-specific export prices." NSK Case Brief at 7-8. Therefore, NSK urges the Department to compute its antidumping duty margin by offsetting positive margins with negative margins.

Koyo also states that the Department's practice has been to set the margins to zero for transactions where CEP is higher than NV. Koyo asserts that this practice has been recognized as having the tendency to inflate margins, referring to *Böwe-Passat Reinigungs-und Washereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (*Böwe-Passat Reinigungs*) (citing commentators who have discussed this tendency). In light of the WTO dispute settlement panel finding in *EC—Bed Linen* that zeroing is inconsistent with Article 2.4.2 of the Antidumping Agreement, Koyo argues, the Department should discontinue its practice of zeroing. Koyo submits that although Article 2.4.2 of the Antidumping Agreement deals with fair comparisons in antidumping investigations, "the panel's reasoning is equally applicable to administrative reviews." Koyo Case Brief at 27. Citing *Böwe-Passat Reinigungs* at 1150, Koyo contends that zeroing does not result in a fair calculation of the weighted-average margin because it mathematically changes the U.S. price of selected transactions.

Koyo notes that the Court has upheld the Department's practice of zeroing, finding it to be a reasonable interpretation

of section 731 of the Tariff Act. Despite this, Koyo asserts that section 751(a)(2) of the Tariff Act implies that the Department is not permitted to disregard negative margins. Instead, Koyo avers, the statute directs the Department to determine "the normal value and export price (or constructed export price) *of each entry of the subject merchandise* and the dumping margin *for each such entry*." Koyo Case Brief at 27, quoting section 751(a)(2) of the Tariff Act (emphasis added by Koyo). Thus, Koyo maintains that the statute indicates that the Department should calculate a dumping margin for each entry, regardless of whether the entry is positive or negative. Koyo argues that Department should include negative margins in the weighted-average margin calculation instead of following its practice of zeroing, in order to be consistent with the Antidumping Agreement (as interpreted in *EC—Bed Linen*). Like NSK, Koyo cites *Federal-Mogul* at 1581 ("GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.") Stating that the Court intended to uphold the Department's practice of zeroing "[u]nless and until it becomes clear that such a practice is impermissible or unreasonable," Koyo contends that *EC—Bed Linen* shows that zeroing is "impermissible." Koyo Case Brief at 28, quoting *Böwe-Passat Reinigungs* at 1150. Therefore, Koyo asserts that the Department should include negative margins in its calculation of Koyo's weighted-average dumping margins.

Timken responds that in *EC—Bed Linen* the WTO panel determined that the Antidumping Agreement did not allow administering authorities to zero negative prices when determining dumping margins by comparing weighted averages in investigations. Timken asserts that the decision in *EC—Bed Linen* was limited to an interpretation of Article 2.4.2 of the Antidumping Agreement, which requires WTO members to establish dumping margins during an

investigation. Citing Article 2.4.2 of the Antidumping Agreement, Timken contends that *EC—Bed Linen* is not relevant to administrative reviews, and therefore holds that the zeroing of negative margins in this administrative review complies with U.S. obligations under the Antidumping Agreement.

With respect to Koyo's argument that zeroing produces unfair results, Timken claims that Koyo has not provided any data illustrating that zeroing produced unfair results in this case. Timken argues that the Department's practice of zeroing negative margins continues to be consistent with the statute, as the purpose of both the Antidumping Agreement and U.S. antidumping law is to provide a remedy for injurious dumping. In fact, Timken states, the statutory scheme does not allow the Department to ignore injurious dumping. Citing *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990), Timken maintains that the Department is charged with determining dumping margins as accurately as possible. According to Timken, Koyo and NSK's suggestion to offset positive margins with negative margins would not remedy the effect of injurious dumping on the domestic industry. Timken refers to *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1156 (Fed. Cir. 1994), in which the Federal Circuit found that allowing foreign manufacturers to offset less-than-fair-value sales with higher priced sales would defeat the statutory purpose. Timken contends that the domestic industry is not remedied by fair-value sales, providing an example in which a foreign producer dumps its product in the United States for the first half of the review period, forcing an already injured industry into bankruptcy, and then recovers its losses by raising prices during the second half of the review period. Timken points out that the Court repeatedly has upheld the Department's established practice of zeroing negative margins in order to avoid cloaking dumping margins, citing *Serampore Indus. v. United*

States, 675 F. Supp. 1354 (CIT 1987) (*Serampore*) and *Böwe-Passat Reinigungs*.

Timken argues that pursuant to section 751(a)(2) of the Tariff Act, the Department first determines EP or CEP and then calculates a dumping margin for each entry. Timken contends that there is nothing in the statute, SAA, or legislative history suggesting that the Department change its practice. Citing the statutory definition of "dumping margin" in section 771(35) of the Tariff Act, Timken states that the amount by which NV exceeds EP or CEP of a fairly-traded import is zero. Therefore, Timken asserts, Koyo's argument that section 751(a)(2) of the Tariff Act supports the use of negative margins to offset positive margins is incorrect. In light of the foregoing arguments, Timken requests that the Department disregard Koyo's and NSK's suggestion that the zeroing of negative margins be eliminated.

Department's Position: These antidumping duty administrative reviews are being conducted under the domestic laws of the United States, which laws are fully consistent with international obligations. We note that the calculation methodology addressed by respondents has been upheld repeatedly as consistent with domestic law by reviewing domestic courts. See *Serampore* and *Böwe-Passat Reinigungs*. Consequently, the WTO dispute resolution panel reports referred to by respondents, which addressed a matter of WTO jurisprudence, and not domestic U.S. law, is not relevant to this determination. We do note in passing, however, that the report in question addressed EC law and practice and was not a challenge to U.S. law.

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APPENDIX J

WORLD TRADE ORGANIZATION

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

("Anti-dumping Agreement")

* * * *

Members hereby *agree* as follows:

PART I

* * * *

Article 2: Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

* * * *

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price

comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

* * * *

APPENDIX K.

103d Congress, 2d Session House Document 103-316, Vol. 1

URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING DOCUMENTS

* * * *

[656] THE URUGUAY ROUND AGREEMENTS ACT

STATEMENT OF ADMINISTRATIVE ACTION

* * * *

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the law. Furthermore, the Administration understand that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.

* * * *

[669] d. Relationship to Federal Law

Section 102 establishes the relationship between the Uruguay Round agreements and U.S. law. The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under those agreements. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law.

* * * *

[820] 1. *Definition of Dumping*

Sections 223 and 224 of the bill amend sections 772 and 773 of the Act, establishing new rules regarding the

determination of export price or constructed export price and normal value. Under new section 773(a), as under existing law, the preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States. Consistent with the Agreement, if home market sales of a foreign like product do not exist or are not useable as a basis for determining normal value, Commerce may identify and measure dumping by comparing the export price or constructed export price to normal value based on either: (1) sales of the foreign like product to a country other than the United States; or (2) constructed value. The requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price and normal value is stated in and implemented by section 773. To achieve such a fair comparison, section 773 provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability.

* * * *